AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
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FEDERAL REGISTER

Vol. 86 Wednesday

No. 247 December 29, 2021

Pages 73947–74352

OFFICE OF THE FEDERAL REGISTER

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DEPARTMENT OF ENERGY

10 CFR Parts 430 and 431

[EERE–2018–BT–STD–0018]

RIN 1904–AE39

Energy Conservation Program for Appliance Standards: Energy Conservation Standards for Residential Furnaces and Commercial Water Heaters

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

ACTION: Notification of final interpretive rule.

SUMMARY: On August 27, 2021, the U.S. Department of Energy (DOE or Department) published in the **Federal Register** for public comment a proposed interpretive rule to reinstate a long-standing interpretation under which, in the context of residential furnaces, commercial water heaters, and similarly-situated products or equipment, the heat exchanger technology (and associated venting) used to supply heated air or hot water is not a performance-related ''feature'' that provides a distinct consumer utility under the Energy Policy and Conservation Act, as amended (EPCA). The August 27, 2021 proposed interpretive rule set forth the basis and rationale for this final interpretive rule, in which DOE responds to public comments and ultimately reinstates its long-standing interpretation as proposed.

DATES: This final interpretive rule is effective December 29, 2021.

ADDRESSES: The docket for this activity, which includes **Federal Register** notices, public comments, and other supporting documents/materials, is available for review at *www.regulations.gov.* All documents in the docket are listed in the *www.regulations.gov* index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

The docket web page can be found at: *www.regulations.gov/#!docketDetail;D=EERE-2018-BT-STD-0018.* The docket web page contains instructions on how to access all documents, including public comments, in the docket.

For further information on how to review the docket, contact the Appliance and Equipment Standards Program staff at (202) 586–6636 or by email: *ApplianceStandardsQuestions@ee.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Ms. Julia Hegarty, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–5B, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (240) 597–6737. Email: *ApplianceStandardsQuestions@ee.doe.gov.*

Mr. Eric Stas, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 586–5827. Email: *Eric.Stas@hq.doe.gov.*

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I. Introduction and Background

The following sections discuss the statutory authority underlying this final interpretive rule, as well as the relevant background related to determination of what constitutes a ''feature'' for the purpose of establishing energy conservation standards under EPCA. Additionally, these sections address: DOE's historical interpretation of what constitutes a ''feature'' for the purpose of establishing energy conservation standards under EPCA; DOE's interpretation in the January 15, 2021 final interpretive rule (86 FR 4776; January 2021 Final Interpretive Rule); the issuance of Executive Order (E.O.) 13990; and the proposed interpretation in the August 27, 2021 notice of proposed interpretive rule (NOPIR) (86 FR 48049; August 2021 NOPIR). The following discussion provides the background for the final interpretive rule presented in this document addressing whether non-condensing technology (and associated venting) constitutes a performance-related ''feature'' under EPCA which may not be eliminated by an energy conservation standard.

A. Authority

EPCA,[1] Public Law 94–163 (42 U.S.C. 6291 *et seq.*), as amended, authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. When establishing new or amended standards for covered products, DOE is directed to consider any lessening of the utility or the performance of covered products likely to result from the imposition of the standard. (42 U.S.C. 6295(o)(2)(B)(i)(IV)) Moreover, the Secretary of Energy (Secretary) may not prescribe an amended or new standard if the Secretary finds (and publishes such finding) that interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States in any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes (collectively referred to hereafter as ''features'') that are substantially the same as those generally available in the United States at the time of the Secretary's finding. (42 U.S.C. 6295(o)(4); the ''features'' provision)

EPCA provides a companion provision at 42 U.S.C. 6295(q)(1), which requires that a rule prescribing an energy conservation standard for a type of covered products shall specify a level of energy use or efficiency higher or lower than that which applies (or would apply) to any group of covered products that have the same function or intended use, if the Secretary determines that covered products within such group:

[1] All references to EPCA in this document refer to the statute as amended through the Energy Act of 2020, Public Law 116–260 (Dec. 27, 2020).

(A) Consume a different kind of energy from that consumed by other covered products within such type (or class); or

(B) have a capacity or other performance-related feature that other products within such type (or class) do not have and such feature justifies a higher or lower standard from that which applies (or will apply) to other products within such type (or class).

In making a determination of whether a performance-related feature justifies the establishment of a higher or lower standard, the Secretary must consider such factors as the utility to the consumer of such a feature, and such other factors as the Secretary deems appropriate. (42 U.S.C. 6295(q)(1))

These provisions apply generally to covered commercial and industrial equipment, other than ASHRAE equipment,[2] through the crosswalk provision at 42 U.S.C. 6316(a). ASHRAE equipment has its own separate statutory scheme under EPCA, with the default situation being that DOE must adopt the level set forth in ASHRAE Standard 90.1 unless the Department has clear and convincing evidence to adopt a more stringent standard (*see* 42 U.S.C. 6313(a)(6)). Under 42 U.S.C. 6313(a)(6)(B)(iii)(II)(aa), there is a provision similar to the ''features'' provision previously discussed that states that the Secretary may not prescribe an amended standard under this subparagraph if the Secretary finds (and publishes the finding) that interested persons have established by a preponderance of the evidence that a standard is likely to result in the unavailability in the United States of any product type (or class) of performance characteristics (including reliability, features, sizes, capacities, and volumes) that are substantially the same as those generally available in the United States at the time of the finding of the Secretary. However, it is noted that this provision contains the specific limitation that it applies to an amended standard prescribed *under this subparagraph* (*i.e.,* when DOE is acting under its authority to set a more-stringent standard). There is no companion ''features'' provision under 42 U.S.C. 6313(a)(6)(A), which is the provision that would apply when DOE is triggered to adopt the levels set by ASHRAE. There is likewise no companion provision to 42 U.S.C. 6295(q)(1) for ASHRAE equipment.

On January 20, 2021, the White House issued E.O. 13990, ''Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.'' 86 FR 7037 (Jan. 25, 2021). Section 1 of that Order lists several policies related to the protection of public health and the environment, including reducing greenhouse gas emissions and bolstering the Nation's resilience to climate change. *Id.* at 86 FR 7037, 7041. Section 2 of the Order also instructs all agencies to review ''existing regulations, orders, guidance documents, policies, and any other similar agency actions (agency actions) promulgated, issued, or adopted between January 20, 2017, and January 20, 2021, that are or may be inconsistent with, or present obstacles to, [these policies].'' *Id.* Agencies are then directed, as appropriate and consistent with applicable law, to consider suspending, revising, or rescinding these agency actions and to immediately commence work to confront the climate crisis. *Id.*

As noted in the August 2021 NOPIR, DOE undertook a review of the final interpretation and withdrawal of proposed rulemakings published in the **Federal Register** on January 15, 2021, in response to E.O. 13990. 86 FR 48049, 48051 (August 27, 2021). While E.O. 13990 triggered the Department's re-evaluation, DOE is relying on the analysis and reasoning presented in the August 2021 NOPIR and in this document, based upon EPCA, to withdraw the January 2021 Final Interpretive Rule and to re-instate its historical interpretation of the ''features'' provision as applied to non-condensing technology, because DOE believes the historical interpretation reflects the better reading of the requirements in EPCA.

B. Historical Interpretation of the ''Features'' Provision

As discussed previously in this document, when evaluating and establishing energy conservation standards, DOE is required to divide covered products into product classes by the type of energy used, by capacity, or by other performance-related features that DOE determines justify a different standard. In making a determination of whether a performance-related feature justifies a different standard, the Department must consider factors such as the utility to the consumer of the feature and other factors DOE determines are appropriate. (42 U.S.C. 6295(q)) As the product class provision is complementary to the ''features'' provision, consideration of what constitutes a feature and what constitutes utility for the purpose of establishing a product class is germane to the application of the ''features'' provision.

At a basic level, a ''feature'' is a trait, attribute, or function of a product. The usefulness and benefit provided to a consumer by a feature is the feature's ''utility.'' Given the multitude of covered products and equipment for which DOE is responsible, the Department has found the concept of ''feature'' to be very case-specific. 86 FR 4776, 4797 (Jan. 15, 2021). No single definition could effectively capture the potential for features across the broad array of consumer products and commercial equipment subject to EPCA's regulatory scheme. *Id.* That is why DOE developed the concept of consumer utility and how the consumer interacts with the product/equipment for when DOE is assessing ''features.'' *Id.*

Historically, DOE has viewed utility as an aspect of the product that is accessible to the layperson and is based on user operation and interaction with the product. This interpretation has been applied in DOE's previous rulemakings by determining utility based on the usefulness or value of the specific feature to the consumer, rather than based on considerations (including design parameters) that do not impact what the consumer perceives as the function of the product, or costs that anyone, including the consumer, manufacturer, installer, or utility companies, may bear. DOE reasoned that this approach is consistent with EPCA's requirement for a separate and extensive analysis of economic justification for the adoption of any new or amended energy conservation standard (*see* 42 U.S.C. 6295(o)(2)(A)–(B) and (3)). Examples of prior consideration of the ''features'' provision, utility, and product/equipment classes are provided in the following paragraphs.

In a final rule addressing energy conservation standards for cooking products, DOE did not consider a design option that eliminated oven door windows. 63 FR 48038, 48041 (Sept. 8, 1998). A number of commenters asserted that the oven door window provides consumer utility by alleviating the need for users to open the oven door to check on the contents. *Id.* DOE agreed with commenters that the removal of the

[2] ''ASHRAE'' refers to the American Society of Heating, Refrigerating and Air-Conditioning Engineers. Under EPCA, ''ASHRAE equipment'' refers to small commercial package air conditioning and heating equipment, large commercial package air conditioning and heating equipment, very large commercial package air conditioning and heating equipment, packaged terminal air conditioners, packaged terminal heat pumps, warm-air furnaces, packaged boilers, storage water heaters, instantaneous water heaters, and unfired hot water storage tanks, which are addressed by ASHRAE in ASHRAE Standard 90.1, *Energy Standard for Buildings Except Low-Rise Residential Buildings.* (*See* 42 U.S.C. 6313(a)(6))

oven door window would increase the frequency with which consumers open the oven door. *Id.* DOE also found this increased opening would have the potential to increase energy usage. *Id.* DOE also indicated that it would re-evaluate oven door window designs should a window material with higher thermal insulation properties become a proven technology. *Id.*

In the case of residential clothes washers, DOE has maintained a product class distinction based on axis of loading (*i.e.,* front-loading and top-loading units). Based on comments received during rulemakings, DOE identified axis of loading as a feature that impacts consumer utility (*i.e.,* the longer cycle times of front-loading residential clothes washers versus cycle times for top-loaders are likely to impact consumer utility). 77 FR 32307, 32319 (May 31, 2012). Conversely, DOE eliminated the suds-saving product class because the market had changed, and, at the time of the rulemaking, DOE did not identify any suds-saving residential clothes washers on the market in the United States. 77 FR 32307, 32317 (May 31, 2012).

In a 2011 rulemaking, DOE created separate product classes for vented and ventless residential clothes dryers based on DOE's recognition of the ''unique utility'' that ventless clothes dryers offer to consumers. 76 FR 22454, 22485 (April 21, 2011). This utility could be characterized as the ability to have a clothes dryer in a living area where vents are impossible to install (*i.e.,* an apartment in a high-rise building). As explained in the accompanying technical support document (TSD), ventless dryers can be installed in locations where venting dryers would be precluded due to venting restrictions.[3]

In a rulemaking for consumer water heaters, DOE found that water heaters that utilize heat pump technology did not need to be placed in a separate product class from conventional types of hot water heaters that utilize electric resistance technology, even though water heaters utilizing heat pumps require the additional installation of a condensate drain that a hot water heater utilizing electric resistance technology does not require. 75 FR 20112, 20135 (April 16, 2010). Regardless of the installation factors, DOE did not find the mode of heating water to be a performance-related feature or provide a unique utility. *Id.* DOE also noted comments stating that, in the then-current market, water heaters that employed heat pump technology were advertised as replacements for water heaters that employed electric resistance technology. *Id.*

However, DOE has cautioned that disparate products may have very different consumer utilities, thereby making direct comparisons difficult and potentially misleading. 76 FR 22454, 22485 (April 21, 2011).

C. January 2021 Final Interpretive Rule

On March 12, 2015, DOE published a notice of proposed rulemaking (NOPR) in the **Federal Register** proposing to amend energy conservation standards for residential non-weatherized gas furnaces and mobile home furnaces, in furtherance of its statutory obligation to determine whether more stringent amended standards would be technologically feasible and economically justified and would save a significant amount of energy. 80 FR 13120 (March 2015 Furnaces NOPR). To provide further consideration of comments suggesting a separate product class for furnaces based on input capacity and in order to mitigate some of the negative impacts of the proposed standards, DOE published a notice of data availability in the **Federal Register** on September 14, 2015. 80 FR 55038. DOE subsequently published a supplemental notice of proposed rulemaking (SNOPR) for this rulemaking in the **Federal Register** on September 23, 2016, in which DOE proposed to establish capacity-based product classes. 81 FR 65720 (September 2016 Furnaces SNOPR). In a separate rulemaking for commercial water heaters, on May 31, 2016, DOE published in the **Federal Register** a proposal to amend the energy conservation standards for commercial water heaters. 81 FR 34440 (May 2016 Commercial Water Heaters NOPR).

In both the residential furnaces rulemaking and the commercial water heaters rulemaking, DOE proposed amended energy conservation standards that would effectively require products/equipment in certain classes to use condensing technology to meet the proposed amended standards, if adopted. *See* 81 FR 65720, 65852 (Sept. 23, 2016); 81 FR 34440, 34503–34504 (May 31, 2016). For the product/equipment classes where such standards were proposed, if finalized, the amended standards would have effectively eliminated all non-condensing products/equipment that are currently on the market in those classes.

In the March 2015 Furnaces NOPR, DOE tentatively concluded that the methods by which a furnace is vented, which are significantly different for condensing and non-condensing furnaces,[4] do not provide any separate performance-related impacts. Therefore, DOE had no statutory basis for defining a separate class based on venting and condensate drainage characteristics because venting methods do not provide unique utility to consumers beyond the basic function of providing heat, which all furnaces perform. 80 FR 13120, 13138 (March 12, 2015). In the September 2016 Furnaces SNOPR, DOE reiterated its tentative conclusion that methods of venting do not provide any performance-related utility separate from the basic function of a furnace. 81 FR 65720, 65753 (Sept. 23, 2016). Similarly, in the May 2016 Commercial Water Heaters NOPR, DOE tentatively concluded that both non-condensing and condensing gas-fired commercial water heating equipment provide the same hot water for use by commercial consumers, and, therefore, separate equipment classes could not be justified. 81 FR 34440, 34463 (May 31, 2016).

On October 18, 2018, DOE received a petition for rulemaking submitted by the American Public Gas Association, Spire, Inc., the Natural Gas Supply Association, the American Gas Association, and the National Propane Gas Association, collectively referred to as the ''Gas Industry Petitioners,'' asking DOE to: (1) Issue an interpretive rule stating that DOE's proposed energy conservation standards for residential furnaces and commercial water heaters would result in the unavailability of ''performance characteristics'' within the meaning of EPCA, specifically by eliminating from the market units utilizing non-condensing technology; and (2) withdraw the proposed energy conservation standards for residential furnaces and commercial water heaters based upon such findings. DOE published the notice of petition in the **Federal Register** on November 1, 2018 and requested public comment.[5] 83 FR 54883.

Following consideration of the comments on the petition, DOE published a NOPIR on July 11, 2019, presenting DOE's tentative

[3] *See* pp. 3–59 of the technical support document, available at *www.regulations.gov/document/EERE-2007-BT-STD-0010-0053.*

[4] Non-condensing furnaces typically use a ''category I'' vent system, which is designed to operate with a non-positive pressure in the vent system and is not designed to withstand condensate. Condensing furnaces, on the other hand, are typically designed for ''category IV'' vent systems, which operate with a positive pressure in the vent system and are designed to withstand condensate.

[5] In response to requests submitted by two stakeholders, DOE extended the initial 90-day comment period for an additional 30 days. 84 FR 449 (Jan. 29, 2019).

interpretation that, in the context of residential furnaces, commercial water heaters, and similarly-situated products/equipment, use of non-condensing technology (and associated venting) would constitute a performance-related ''feature'' under EPCA that cannot be eliminated through adoption of an energy conservation standard. 84 FR 33011 (July 2019 Proposed Interpretive Rule).[6] DOE also provided that, if such interpretation were to be finalized, it anticipated developing supplemental notices of proposed rulemaking that would implement the new legal interpretation for the subject residential furnaces and commercial water heaters. 84 FR 33011, 33021 (July 11, 2019).

DOE published a supplemental notice of proposed interpretation in the **Federal Register** on September 24, 2020, which proposed alternative approaches to product/equipment class setting in this context. 85 FR 60090. The supplemental proposed interpretive rule was in response to comments expressing concern with the proposed focus on ''non-condensing'' technology as the performance-related feature. 85 FR 60090, 60094–60095 (Sept. 24, 2020). Alternatively, the supplemental notice of proposed interpretation considered venting compatibility as a possible ''feature.'' 85 FR 60095 (Sept. 24, 2020). DOE requested comment on this alternative approach. *Id.*

On January 15, 2021, DOE published in the **Federal Register** a final interpretive rule determining that, in the context of residential furnaces, commercial water heaters, and similarly-situated products/equipment, use of non-condensing technology (and associated venting) constitutes a performance-related ''feature'' under EPCA that cannot be eliminated through adoption of an energy conservation standard. 86 FR 4776. Following consideration of comments and data submitted by stakeholders in response to the proposed interpretation and supplemental proposal, DOE found that when used by the appliances in question, non-condensing technology (and associated venting) constitutes a performance-related feature that provides consumer utility distinct from that provided by such appliances that employ condensing technology. More specifically, in contrast to condensing units, DOE stated that non-condensing units: (1) Avoid complex installations in certain locations constrained by space, existing venting, and available drainage; (2) avoid the encroachment on usable space that would occur in certain installations; and (3) do not enhance the level of fuel switching that might accompany standard setting absent a separate product/equipment class for non-condensing appliance. 86 FR 4776, 4816 (Jan. 15, 2021). DOE stated that such interpretation would extend to all relevant/applicable cases involving consumer products, non-ASHRAE commercial equipment, and ASHRAE equipment where DOE adopts a level more stringent than the ASHRAE level. 86 FR 4776, 4816–4817 (Jan. 15, 2021).

In light of this final interpretation, DOE withdrew its March 12, 2015 proposed rule and September 23, 2016 supplemental proposed rule for energy conservation standards for non-weatherized gas furnaces and mobile home gas furnaces, as well as its May 31, 2016 proposed rule for energy conservation standards for commercial water heating equipment. 86 FR 3873 (Jan. 15, 2021). However, DOE has not implemented the January 15, 2021 final interpretation in the context of any individual energy conservation standards rulemakings for affected covered products/equipment.

D. August 2021 Proposed Interpretive Rule

On August 27, 2021, DOE published a proposed interpretative rule in the **Federal Register** (the August 2021 NOPIR), in which DOE re-examined the conclusions reached in the January 2021 Final Interpretive Rule. 86 FR 48049 (August 27, 2021). Based on DOE's reconsideration of the January 2021 Final Interpretative Rule, the Department proposed to revise its interpretation of EPCA's ''features'' provision in the context of condensing and non-condensing technology used in furnaces, water heating equipment, and similarly-situated appliances. 86 FR 48049, 48053 (August 27, 2021). DOE tentatively concluded that, in the context of residential furnaces, commercial water heaters, and similarly-situated products or equipment, use of non-condensing technology (and associated venting) is not a performance-related ''feature'' for the purpose of the EPCA prohibitions at 42 U.S.C. 6295(o)(4) and 42 U.S.C. 6313(a)(6)(B)(iii)(II)(aa). *Id.* DOE initially found that non-condensing technology (and the associated venting) does not provide unique utility to consumers separate from an appliance's function of providing heated air or water, as applicable. *Id.*

DOE initially found this interpretation to be the best reading of the relevant provisions of EPCA, which is consistent with the intent and purposes of the statute. *Id.* Specifically, the proposed interpretation would align better with EPCA's goals of increasing the energy efficiency of covered products and equipment through the establishment and amendment of energy conservation standards and promoting conservation measures when feasible. (*See id.* (*citing* 42 U.S.C. 6291 *et seq.,* as amended)). Furthermore, DOE initially determined that the proposed interpretation would avoid requiring separate product or equipment classes to preserve less efficient technologies, while maintaining consideration of installation costs as part of the extensive analysis of economic justification for the adoption of any new or amended energy conservation standard (*see id.* at 86 FR 48049, 48054 (*citing* 42 U.S.C. 6295(o)(2)–(3); 42 U.S.C. 6313(a)(6)(A)–(C); 42 U.S.C. 6316(a)). (The complete discussion of DOE's rationale for the August 2021 NOPIR is set forth at 86 FR 48049, 48053–48057 (August 27, 2021).)

DOE requested comment on the proposed interpretation, which would reinstate DOE's prior reading of EPCA's ''features'' provision in the context of residential furnaces, commercial water heaters, and similarly-situated products. 86 FR 48049, 48057–48058 (August 27, 2021). The comment period was scheduled to close on September 27, 2021. However, in response to a request from a number of stakeholders,[7] DOE subsequently extended the comment period until October 12, 2021. 86 FR 53014 (Sept. 24, 2021).

DOE received comments in response to the August 2021 NOPIR from the interested parties listed in Table I.1.

[6] The July 2019 Proposed Interpretive Rule granted the request for an interpretive rule but initially denied the Gas Industry Petitioners' request to withdraw DOE's earlier proposed rules for residential furnaces and commercial water heaters. 84 FR 33011, 33021 (July 11, 2019).

[7] *See* comment period extension request submitted by American Gas Association, American Public Gas Association, Spire Inc. and Spire Missouri, Inc., and the National Propane Gas Association, Docket No. EERE–2018–BT–STD–0018–0125.

TABLE I.1—LIST OF COMMENTERS WITH WRITTEN SUBMISSIONS ON THE AUGUST 2021 NOPIR

Commenter(s)	Abbreviation in this document	Commenter type
A.O. Smith Corporation	A.O. Smith	Manufacturer.
Air-Conditioning, Heating & Refrigeration Institute	AHRI	Manufacturer Trade Association.
American Gas Association, Natural Gas Supply Association, U.S. Chamber of Commerce	AGA *et al*	Utility & Business Trade Associations.
American Public Gas Association, Spire, Inc., National Propane Gas Association, and Plumbing, Heating-Cooling Contractors—National Association.	APGA *et al*	Utility & Installer Trade Associations.
American Gas Association, American Public Gas Association, Spire Inc. and Spire Missouri, Inc., and the National Propane Gas Association.	[*]	Utility Trade Associations.
Appliance Standards Awareness Project, American Council for an Energy-Efficiency Economy, Consumer Federation of America, Evergreen Action, Fsi Engineers, Green Energy Consumers Alliance, Midwest Energy Efficiency Alliance, National Consumer Law Center, Rocky Mountain Institute, Southwest Energy Efficiency Project.	ASAP *et al*	Advocacy Groups.
Attorneys General of New York, Colorado, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Vermont, Washington, The Commonwealth of Massachusetts, The District of Columbia, and the City of New York.	State Attorneys General.	State, Local Governments.
Bradford White Corporation	Bradford White	Manufacturer.
California Energy Commission	CEC	State.
California Investor-Owned Utilities (Pacific Gas and Electric Company, San Diego Gas and Electric, and Southern California Edison).	CA IOUs	Utilities.
Crown Boiler Company	Crown Boiler	Manufacturer.
Gas End Use Advocacy Group	GEUAG	Advocacy Group.
Heating, Air-Conditioning, & Refrigeration Distributors International	HARDI	Trade Association.
Institute for Energy Research	IER	Advocacy Group.
Institute for Policy Integrity—New York University School of Law	Institute for Policy Integrity.	Academic Institution.
Natural Resources Defense Council, Sierra Club, Earthjustice	NRDC *et al*	Advocacy Groups.
New Buildings Institute	NBI	Advocacy Group.
New Yorker Boiler Company	New Yorker Boiler	Manufacturer.
Northwest Energy Efficiency Alliance	NEEA	Advocacy Group.
Regal Beloit Americas, Inc	Regal Beloit	Manufacturer.
Steven Kramer	Kramer	Individual.
U.S. Boiler Company	U.S. Boiler	Manufacturer.

* Commenters submitting a request for an extension of the NOPIR public comment period, as discussed previously.

A parenthetical reference at the end of a comment quotation or paraphrase provides the location of the item in the public record.[8]

II. Final Interpretive Rule and Response to Comments

Based on DOE's reconsideration of the January 2021 Final Interpretative Rule and careful consideration of the comments received in response to the August 2021 NOPIR, the Department is revising its interpretation of EPCA's ''features'' provision in the context of condensing and non-condensing technology used in furnaces, water heating equipment, and similarly-situated appliances. Consistent with the interpretation presented in the May 2015 Furnaces NOPR, the September 2016 Furnaces SNOPR, and the May 2016 Commercial Water Heaters NOPR, DOE concludes that, in the context of residential furnaces, commercial water heaters, and similarly-situated products or equipment, use of non-condensing technology (and associated venting) is not a performance-related ''feature'' for the purpose of the EPCA prohibitions at 42 U.S.C. 6295(o)(4) and 42 U.S.C. 6313(a)(6)(B)(iii)(II)(aa). DOE finds that non-condensing technology (and the associated venting) does not provide unique utility to consumers separate from an appliance's function of providing heated air or water, as applicable.

Upon further consideration, DOE concludes that utility is determined through the benefits and usefulness the feature provides to the consumer while interacting with the product, not through design parameters impacting installation complexity, or costs that anyone, including the consumer, manufacturer, installer, or utility companies, may bear. Stated differently, DOE has determined that differences in cost or complexity of installation between different methods of venting (*e.g.,* a condensing furnace versus a non-condensing furnace) do not make any method of venting a performance-related feature under 42 U.S.C. 6295(o)(4), as would justify separating the products/equipment into different product/equipment classes under 42 U.S.C. 6295(q)(1).

This interpretation is consistent with EPCA's requirement for a separate and extensive analysis of economic justification for the adoption of any new or amended energy conservation standard (*see* 42 U.S.C. 6295(o)(2)–(3); 42 U.S.C. 6313(a)(6)(A)–(C); 42 U.S.C. 6316(a)). Therefore, because DOE has come to see that the issues underlying its January 2021 Final Interpretive Rule are more appropriately framed as matters of cost, this interpretation will return those issues for resolution to their proper sphere as part of DOE's economic analysis in individual energy conservation standards rulemakings. DOE finds this interpretation to be the better reading of the relevant provisions of EPCA, which is consistent with the intent and purposes of the statute. In the balance of this section, DOE summarizes the comments received on the August 2021 NOPIR, followed by the agency's responses, which provide further basis for the final interpretation set forth in this document.

[8] The parenthetical reference provides a reference for information located in the docket for the development of this final interpretive rule. (Docket No. EERE–2018–BT–STD–0018, which is maintained at *www.regulations.gov*). The references are arranged as follows: (Commenter name, comment docket ID number, page of that document).

In response to the August 2021 NOPIR, DOE received a number of general comments either supporting or opposing DOE's proposed change in interpretation. Along these lines, the State Attorneys General commented in support of DOE's proposed interpretation of the EPCA's ''features'' provision, stating they strongly support a robust national appliance and equipment efficiency program. (State Attorneys General, No. 136 at p. 1) ASAP *et al.* stated that DOE's proposed interpretation would help protect consumers and allow the Department to carry out EPCA's goal of increasing the energy efficiency of covered products and equipment through energy conservation standards. (ASAP *et al.,* No. 143 at p. 2) NEEA, NBI, A.O. Smith, CEC, the CA IOUs, and NRDC *et al.* also commented in support of returning to DOE's long-standing interpretation of the ''features'' provision, under which the technology used to supply heated air or water does not constitute a performance-related ''feature.'' (NEEA, No. 137 at p. 1; NBI, No. 128 at p. 1; A.O. Smith, No. 133 at p. 1; CEC, No. 134 at p. 1; CA IOUs, No. 141 at p. 2; NRDC *et al.,* No. 144 at p. 1) Regal Beloit likewise supported DOE revisiting the interpretation of ''feature'' in the context of residential furnaces and commercial water heaters. (Regal Beloit, No. 131 at p. 1).

In contrast, Crown Boiler, New Yorker Boiler, U.S. Boiler,[9] and AGA *et al.* favored maintaining the interpretation adopted in the January 2021 Final Interpretive Rule. (Crown Boiler, No. 127 at p. 1; New Yorker Boiler, No. 130 at p. 1; U.S. Boiler, No. 129 at p. 1; AGA *et al.,* No. 135 at p. 2). AHRI requested DOE not to implement the proposed policy reversal, arguing that the condensing/non-condensing performance feature provides an important utility to consumers. (AHRI, No. 139 at p. 1).

GEUAG objected to the proposed interpretation, asserting that DOE failed to engage in the reasoned decision-making in the August 2021 NOPIR required by administrative law. (GEUAG, No. 132 at p. 4) GEUAG commented that nothing in the technology or operation of these products has changed since DOE published the January 2021 Final Interpretive Rule, nor has anything changed in the extensive analyses, facts, and studies that supported that features determination. (*Id.* at p. 5).

APGA *et al.* asserted that DOE did not provide sufficient time to adequately comment and thoroughly analyze the proposed reversal of the interpretation issued in response to the Gas Industry Petition. (APGA *et al.,* No. 140 at p. 7) IER commented that the DOE failed to provide a reasoned explanation for the change, and instead merely asserted the exact opposite of its prior explanation in the January 2021 Final Interpretive Rule. (IER, No. 138 at p. 2) AHRI expressed concern about the change in course on this ruling within such a short period of time, stating that sudden changes create significant costs and administrative burdens for manufacturers and hinder innovation and progress. (AHRI, No. 139 at p. 4)

In response to these comments and as further explained elsewhere in this document, DOE is issuing this final interpretation following a reexamination of the record developed in the rulemakings for residential furnaces and commercial water heaters, review of the comments received to the August 2021 NOPIR, and further analysis of DOE's authority under EPCA. The issues addressed by this re-evaluation and the information on which this final interpretation is based have been thoroughly aired, not only in this proceeding, but also in a number of prior rulemakings (which themselves had ample opportunity for public comment), so the record before the agency is substantial. Moreover, as noted previously, DOE provided an extension of the opportunity for public comment on the August 2021 NOPIR at stakeholder request. Consequently, this final interpretive rule is the product of considerable public input.

DOE agrees with the commenters that little has changed in terms of the technology or operation of the products/equipment at issue since promulgation of the January 2021 Final Interpretive Rule and DOE has not acted to implement that interpretation during the intervening period. However, the absence of subsequent developments on the manufacturing and regulatory fronts does not preclude DOE from reexamining the substantial existing record to assess the soundness of its prior ''features'' determination. Furthermore, because stakeholder positions on the relevant issues have been well documented in the past, when coupled with the lack of any substantial changes during the intervening period, the Department does not agree with those stakeholders who argued that the comment period provided for in the August 2021 NOPIR (45 days in total) was inadequate to analyze DOE's proposal or to prepare written comments. Commenters have also failed to demonstrate any specific harms suffered as a result of reliance on DOE's interpretation between the January 2021 Final Interpretive Rule and the August 2021 NOPIR, and, particularly because that final interpretation was never implemented through amended energy conservation standards, the *status quo* never changed during this period of interpretation review.

As discussed in the following sections, based on this review and the extensive record that exists, DOE finds its historical interpretation (*i.e.,* the interpretation proposed in the August 2021 NOPIR) to be the better reading of the relevant provisions of EPCA, which also better aligns with EPCA's goals of increasing the energy efficiency of covered products and equipment through the establishment and amendment of energy conservation standards and promoting conservation measures when feasible. (42 U.S.C. 6291 *et seq.*) Furthermore, this interpretation avoids requiring separate product or equipment classes to preserve less efficient technologies, while maintaining consideration of installation costs as part of the extensive analysis of economic justification required by EPCA for the adoption of any new or amended energy conservation standard (*see* 42 U.S.C. 6295(o)(2)–(3); 42 U.S.C. 6313(a)(6)(A)–(C); 42 U.S.C. 6316(a)). The following paragraphs set forth DOE's rationale for its revised interpretation in further detail, as well as the responses to other specific comments received.

A. ''Features'' Provision and Utility

As described previously in this document, DOE must follow specific statutory criteria for prescribing new or amended energy conservation standards for covered products and covered equipment. In general, a new or amended standard must be designed to achieve the maximum improvement in energy efficiency that the Secretary determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A); 42 U.S.C. 6295(o)(3)(B); 42 U.S.C. 6316(a)) In deciding whether a proposed standard is economically justified, DOE must determine whether the benefits of the standard exceed its burdens after receiving comments on the proposed standard and by considering, to the greatest extent practicable, seven factors. One of the seven factors for consideration is the lessening of the utility or the performance of the covered products likely to result from the standard. (42 U.S.C. 6295(o)(2)(B)(i)(IV); 42 U.S.C. 6313(a)(6)(B)(ii)(IV); 42 U.S.C. 6316(a))

EPCA further directs that the Secretary may not prescribe an amended

[9] Crown Boiler, New Yorker Boiler, and U.S. Boiler submitted substantively identical comments.

or new standard if the Secretary finds (and publishes such finding) that interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States in any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States at the time of the Secretary's finding. (42 U.S.C. 6295(o)(4); 42 U.S.C. 6313(a)(6)(B)(iii)(II); 42 U.S.C. 6316(a)) Also, as discussed, when prescribing an energy conservation standard, DOE must consider whether separate product/equipment classes are justified based on: (1) Consumption of a different kind of energy or (2) existence of performance-related features and their associated utility. (42 U.S.C. 6295(q)(1); 42 U.S.C. 6316(a)) The ''features'' provision, the seven factors for economic justification, and the product class provisions are all required considerations in establishing new and amended energy conservation standards.

As discussed in the August 2021 NOPIR, a ''feature'' is a trait, attribute, or function of a product. 86 FR 48049, 48053 (August 27, 2021). The usefulness and benefit provided to a consumer by a feature is the feature's ''utility,'' and consumer utility is used to evaluate whether a purported feature justifies a separate product class. *Id.*

DOE has historically viewed utility of a product or equipment as an aspect of the appliance that is accessible to the layperson consumer and is based upon user operation and interaction with that appliance. Borrowing from the examples presented in the previous section of this document, oven door windows and angle of access for clothes washers are illustrative of this principle. Consumers use the oven door window (in conjunction with the oven lamp) to gauge the progress of food undergoing baking, without the need to open the oven door. Needing to open the oven door and losing heat would arguably decrease the energy efficiency of the oven. The oven door window is a feature which consumers generally appreciate and with which they routinely interact when cooking. The window's elimination would result in the loss of a performance-related feature that provides valued utility for consumers. Regarding the angle of access of a clothes washer, consumers currently have two options when purchasing clothes washers: Front-loading machines and top-loading machines. Some consumers, such as the elderly, may prefer a top-loading clothes washer, because it is easier to reach the laundry without excessive bending, which is in contrast to the angle of access of a front-loading washer. A broad spectrum of consumers recognizes and appreciates the ability of a top-loading washer to readily accept additional clothing items, even after a wash cycle has begun. Other consumers, such as those with disabilities, may prefer a front-loading machine because that angle of access better suits their access needs. The two angles provide consumer utility in terms of ease of loading or use to different consumer subgroups. As with the oven door window, the angle of access is a feature with which consumers routinely interact while washing clothes. Consequently, consistent with the requirements of EPCA, DOE views angle of access as a performance-related feature for clothes washers that cannot be eliminated from the market through adoption of an energy conservation standard.

In contrast to the examples discussed in the preceding paragraph, DOE has historically viewed a consumer's interaction with a furnace or water heater to be a simple one, whereby the user interacts only to initiate demand for heated air or water. After the consumer adjusts the thermostat or faucet, the user receives the requested heated air or water. There is no noticeable difference to the consumer in output based upon the type of technology (non-condensing or condensing) or venting used by the appliance, and, therefore, there is no difference in the utility derived from the appliance based on these factors. As noted previously, this approach had been DOE's longstanding interpretation of EPCA's ''features'' provision in the context of these appliances until the January 2021 Final Interpretive Rule.

On this topic, commenters had divergent viewpoints as to whether non-condensing technology, and associated venting, constitute a performance-related feature under EPCA. One group of commenters clearly favored the approach proposed in the August 2021 NOPIR. For example, NEEA commented in support of DOE's proposed interpretation that the technology used to supply heated air or water does not constitute a performance-related ''feature'' and that venting type or the use of non-condensing technology does not constitute a performance-related feature as defined in EPCA. (NEEA, No. 137 at p. 1) NEEA asserted that users are typically unaware of their water heater's or furnace's venting category or heating technology, as it does not provide them with any utility. (NEEA, No. 137 at p. 2)

CEC generally supported reinstatement of the prior interpretation of ''features,'' stating that the interpretation from the January 2021 Final Interpretive Rule is unjustified, is not authorized by law, misapplies EPCA, and will preserve inefficient products that offer no unique utility to the consumer. (CEC, No. 134 at p. 1) CEC agreed that the use of non-condensing technology (and associated venting) is not a performance-related feature for the purpose of the EPCA prohibitions because it does not have a direct effect on the utility of providing the consumer with hot air or water. (CEC, No. 134 at p. 3)

NBI commented that non-condensing technologies used in furnaces and water heaters do not represent a performance-related feature that justifies a different energy conservation standard. (NBI, No. 128 at p. 1) NBI further commented that non-condensing technology does not represent a unique utility to consumers that is separate from the appliance's function of providing heated air or water. (*Id.*)

The Institute for Policy Integrity stated that, while there may be some undefined, limited number of cases in which installation of a condensing unit could result in the loss of some usable space, in all other cases, such installation would not result in the loss of usable space. The commenter went on to state that the potential unavailability of a unit using non-condensing technology would not result in any significant loss of utility for many, if not most, consumers. (Institute for Policy Integrity, No. 145 at p. 3)

A.O. Smith stated that the proposed reversal of the January 2021 Final Interpretive Rule would return the Department to the most sensible reading of the statute. (A.O. Smith, No. 133 at p. 2) The State Attorneys General commented that furnaces and water heaters using non-condensing technologies and associated venting offer no unique utility to consumers beyond the basic function of providing heated air and heated water and that DOE had a strong statutory basis for its historical interpretation of ''features.'' (State Attorneys General, No. 136 at pp. 2, 3)

Another group of commenters supported the January 2021 Final Interpretive Rule as the proper application of EPCA's ''features'' provision. Among this group, Bradford White asserted that, based on the dictionary definitions of ''attribute'' and ''characteristic,'' a feature would include an attribute, which could be

inferred as a distinguishing trait of a commercial water heater (*i.e.,* different types of venting). (Bradford White, No. 146 at p. 2) Bradford White commented that reliability, which it asserted does not directly relate to the utility that a consumer sees from a product, is considered a characteristic in the context of the ''features'' provision of EPCA. (*Id.*) The commenter reasoned that, therefore, venting could similarly be treated as a distinguishing feature even if it does not directly relate to the utility (*e.g.,* hot water). (*Id.*) Bradford White disagreed with DOE's statement that energy efficiency differences arise from technologies and design parameters other than size, arguing that condensing technology requires more heat exchange surface area and larger tank size, thereby increasing the size of the overall system and contributing to installation concerns. (*Id.* at p. 3) Bradford White also requested that DOE provide the data it used to re-evaluate the January 2021 Interpretive Final Rule. (*Id.*)

Crown Boiler, New Yorker Boiler, and U.S. Boiler commented that the historical definition of ''utility'' for furnaces and water heaters, provided by DOE, ignores the installation considerations that impact the consumer directly. (Crown Boiler, No. 127 at p. 3; New Yorker Boiler, No. 130 at p. 3; U.S. Boiler, No. 129 at p. 3) GEUAG commented that, in considering what constitutes a ''feature,'' DOE must consider that condensing appliances cannot (physically or economically) perform in conjunction with non-condensing venting systems. (GEUAG, No. 132 at p. 11) GEUAG stated that in order to preserve consumer choice over the use of those energy alternatives that best meet the consumer's economic and operational needs, the January 2021 Final Interpretative Rule should be maintained. (*Id.* at pp. 2–3)

AGA *et al.* commented that non-condensing furnaces and water heaters provide unique utility in their ability to commonly vent with other gas appliances, vent into masonry chimneys, operate in unconditioned space without freeze protection, easily install in retrofit applications, and operate without the need to dispose of condensate. (AGA *et al.,* No. 135 at p. 29) AGA *et al.* stated that the facts in the record support a finding that design-specific constraints related to non-condensing technology present important performance-related features, valued by consumers, that justify treating non-condensing appliances as a separate class from condensing appliances. (*Id.* at p. 30) AGA *et al.* objected to the suggestion that features that make the product work in a consumer's existing home or business are not important performance-related features. (*Id.* at p. 27)

Crown Boiler, New Yorker Boiler, and U.S. Boiler stated that a ''layperson consumer'' may not understand the technical issues associated with a move from Category I (''atmospheric'') venting (*i.e.,* the venting commonly used in conjunction with non-condensing products) to Category IV (''condensing'') venting, but consumers will notice the impacts of the associated structural modifications necessary to accommodate the Category IV vent system, the presence of a condensing vent terminal on the side of their house, and the resulting noise and/or an exhaust plume that damages the building exterior, harms plants, or simply obstructs the view. (Crown Boiler No. 127 at p. 3; New Yorker Boiler, No. 130 at p. 3; U.S. Boiler, No. 129 at p. 3)

HARDI commented that it disagrees with DOE's interpretation of consumer utility and determining it only through the lens of whether the feature benefits the consumer. The commenter argued that changes to the living space caused by these retrofits do impact the utility of the new equipment, often in negative ways. (HARDI, No. 142 at pp. 2–3) For example, HARDI commented that replacing venting systems and/or relocating equipment in existing homes could lead to changes in the living space that would be unnecessary if a non-condensing system were installed, and that condensing venting systems may require freeze mitigation equipment (to prevent condensate from freezing) that could be impractical. (*Id.*) HARDI asserted limiting the ''utility'' definition simply to how a consumer interacts with the equipment in daily life is not a proper measurement of utility, particularly for heating, ventilation, and air conditioning (HVAC) equipment, which HARDI stated is often considered an ''invisible good'' (*i.e.,* if the product continues to operate as designed, the consumer is unaware of its existence). (*Id.* at p. 3)

HARDI also commented that inclusion of ''size'' in the ''features'' provision is not specifically limited to the size of the equipment itself, and that the change in size caused by the encroachment of a consumer's living space due to new venting or increased equipment closet size would similarly violate EPCA's protections. (*Id.*) Crown Boiler, New Yorker Boiler, and U.S. Boiler asserted that the potential loss of living space to accommodate a new condensing vent system is tantamount to setting a standard that makes an existing appliance size unavailable, even if the size of the appliance itself is unchanged. (Crown Boiler No. 127 at p. 3; New Yorker Boiler, No. 130 at p. 3; U.S. Boiler, No. 129 at p. 3) APGA *et al.* commented that the concept of preserving the availability of a product size is the same as preserving the availability of products that are compatible with the built-in venting systems provided to serve the appliances installed in those spaces in that in both cases, the statute prohibits efficiency standards that leave purchasers without the kinds of products that the infrastructure of their building was designed to accommodate. (APGA *et al.,* No. 140 at pp. 4, 11)

DOE responds to these comments as follows. As discussed in the August 2021 NOPIR and in the following paragraphs, there is a strong statutory basis for returning to DOE's historical interpretation of viewing the utility of a product or equipment as an aspect of the appliance that is accessible to the layperson consumer and is based upon user operation and interaction with that appliance. As stated, EPCA prohibits the Secretary from prescribing an amended or new standard if the Secretary finds (and publishes such finding) that interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States in any covered product (or certain covered equipment) type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States at the time of the Secretary's finding. (42 U.S.C. 6295(o)(4); 42 U.S.C. 6313(a)(6)(B)(iii)(II)(aa); 42 U.S.C. 6316(a))

EPCA does not define these listed attributes or the related utility of such ''features.'' Therefore, to understand further those attributes that qualify as ''features'' and their relevant utility, DOE looks to EPCA as a whole and the purpose of the statute. (*See Robinson* v. *Shell Oil Co.,* 519 U.S. 337, 341 (1997)) To this end, DOE has once again carefully examined the relevant statutory provisions and would highlight the following.

First, EPCA authorizes DOE to prescribe new or amended energy conservation standards for covered products and covered equipment. (42 U.S.C. 6295(a)(2); 42 U.S.C. 6313) EPCA defines ''energy conservation standard,'' in relevant part, as a performance standard that prescribes the minimum *energy efficiency* or maximum *energy use* of an appliance. (42 U.S.C. 6291(6);

42 U.S.C. 6311(18) (emphasis added)) ''Energy efficiency'' is the ratio of the useful output of services from a consumer product [or an article of industrial equipment] to the energy use of such a product [or article]. (42 U.S.C. 6291(5); 42 U.S.C. 6311(3)) ''Energy use'' means, in relevant part, the quantity of energy directly consumed by a consumer product [or article of industrial equipment] at the point of use. (42 U.S.C. 6291(4); 42 U.S.C. 6311(4)) EPCA further provides that DOE may establish more than one energy conservation standard for products that serve more than one major function by setting one energy conservation standard for each major function. (42 U.S.C. 6295(o)(5); 42 U.S.C. 6316(a))

Reading these provisions in the context of EPCA as a whole, the statute requires the Department to establish energy conservation standards that regulate the energy use associated with the useful output or energy consumption at the point of use of an appliance in operation of its major function. Where an appliance possesses more than one major function, Congress authorized and directed DOE to consider regulation of energy efficiency or consumption of an appliance for each major function. Where Congress tasked DOE to address other matters beyond the appliance's major function(s), it expressly directed DOE to set standards that pursue those other objectives, such as when it directed the agency to establish standards for standby mode and off mode operation of covered products (*see* 42 U.S.C. 6295(gg)).

Given EPCA's focus on an appliance's major function(s), it is reasonable to assume that the consumer would be cognizant of such function and recognize such feature as providing additional benefit in the appliance's performance of such major function. It follows that an aspect of the appliance whose elimination would not be noticed by the consumer when interacting with the appliance would not be the type of product characteristic that Congress would expect DOE to preserve at the expense of energy savings. Given that DOE is directed to consider the application of EPCA's ''features'' provision in appropriate cases when prescribing new or amended energy conservation standards, DOE finds the better reading of the ''features'' provision (*i.e.,* those features that cannot be eliminated by the establishment of a new or amended energy conservation standard) to be those features that provide a consumer unique utility during the operation of the appliance in performance of its major function(s). Stated another way, the ''features'' provision and the related utility of such features pertain to those aspects of the appliance with which the consumer interacts during the operation of the product (*i.e.,* when the product is providing its ''useful output'') and the utility derived from those features during normal operation.

Using this logic, in the context of residential furnaces, commercial water heaters, and similarly-situated products or equipment, incorporation of non-condensing technology (and associated venting) is not a performance-related ''feature'' for the purpose of the EPCA prohibitions at 42 U.S.C. 6295(o)(4) and 42 U.S.C. 6313(a)(6)(B)(iii)(II)(aa).

As discussed in the subsequent paragraphs, DOE acknowledges that a condensing appliance generally cannot operate as intended by the manufacturer if installed with a non-condensing venting system without modifications. Also, issues of complex and costly installations that require modifications to the existing venting system to be properly installed, as well as potential alternatives, are economic matters appropriately addressed as part of the determination of whether new or amended standards are economically justified, as required by EPCA.

DOE finds that non-condensing technology (and the associated venting) does not provide unique utility to consumers distinct from an appliance's function of providing heated air or water, as applicable. Regardless of changes to the living space that may be required at the time of installation, the consumer utility of a condensing residential furnace or commercial water heater is the same as that of a non-condensing residential furnace or commercial water heater once installed and operating. While interacting with a residential furnace or commercial water heater during operation of the appliance, a consumer discerns no unique utility resulting from the specific heat exchanger technology (non-condensing or condensing) or the associated venting, as the heated air or water provided by the appliance is indistinguishable to the consumer regardless of those attributes. Because the consumer realizes the same perceived benefit (*i.e.,* heated air or water) regardless of the technology used by the appliance, there is no unique utility to preserve as would justify sacrificing potential additional gains in energy savings through new or amended energy conservation standards in future product-specific rulemakings.

DOE disagrees with Bradford White that the Department's reading, as adopted in this final interpretive rule, is inconsistent with the inclusion of ''reliability'' in the ''features'' provision. Whether a consumer can depend on a product to provide its useful output when needed goes directly to an aspect of the appliance that is accessible to the layperson consumer and is based upon user operation and interaction with that appliance. Preserving reliability ensures, for example, that when a consumer calls upon a residential furnace or commercial water heater, the consumer is provided heated air or water, as the case may be. Conversely, there is no noticeable difference to the consumer in access or output based upon the type of technology or venting used by the appliance. In addition, DOE disagrees with Bradford White's assertion that condensing technology requires an increase in the overall size of a water heater, and instead, the agency agrees with the Institute for Policy Integrity that installation of a condensing appliance would not result in a loss of useful space for most consumers. To confirm this understanding, DOE conducted a review of several condensing and non-condensing models having similar characteristics (*i.e.,* input rating and storage volume) from multiple manufacturers and found that the overall dimensions for condensing models were not significantly larger than for non-condensing models.[10] Further, changes to product dimensions resulting from increasing efficiency is more appropriately considered as part of the energy conservation standards rulemaking process, so that DOE can evaluate the appropriate cost impacts on a case-by-case basis.

APGA *et al.* further commented that establishing energy conservation standards at a condensing level would make all atmospherically-vented furnaces and water heaters no longer commercially viable. (APGA *et al.,* No. 140 at p. 7) GEUAG asserted that the adoption of proposed standards under the interpretation set forth in the August 2021 NOPIR would effectively eliminate the use of non-condensing gas furnaces, which is not permitted under 42 U.S.C. 6295(o)(4). (GEUAG, No. 132 at pp. 3–4)

In response to APGA *et al.* and GEUAG, DOE notes that, in establishing the ''features'' provision, EPCA anticipates that new or amended energy

[10] DOE notes that it surveyed the dimensions of representative commercial water heaters (100 gallon, 200,000 British thermal units (Btu)/hour) and found the height and diameter dimensions comparable. The cubic volume of condensing models ranged from 20 percent less to 2 percent more than the cubic volume of comparable non-condensing models.

conservation standards may result in the unavailability of certain inefficient technologies. Preserving inefficient technologies would be inimical to the statute's energy-saving purposes. Accordingly, EPCA's ''features'' provision is targeted to ensure preservation of only certain performance characteristics (including reliability), features, sizes, capacities, and volumes. 42 U.S.C. 6295(o)(4). However, as discussed in section II.C of this document, an overly broad reading of the ''features'' provision to include features that do not impact the utility of the covered product would preserve inefficient technologies at the expense of EPCA's energy conservation goals and frustrate the purpose of EPCA.

In the August 2021 NOPIR, DOE clarified that the proposed view of the ''features'' provision in the present case of non-condensing gas-fired residential furnaces and commercial water heaters is distinguishable from certain other products that the Department has regulated in the past (*e.g.,* space-constrained central air conditioners and ventless and compact clothes dryers). 86 FR 48049, 48055 (August 27, 2021).

Certain commenters agreed with the reasoning in DOE's August 2021 NOPIR that DOE's past determinations of the statute's ''features'' provision were properly applied and that the current case examining condensing vs. non-condensing technology is distinguishable. Along these lines, NEEA commented that the interpretation proposed in the August 2021 NOPIR is consistent with DOE's historical interpretation of a performance-related feature and that the features of water heaters and furnaces accessible to a layperson that affect user operation are the ability of the equipment to provide hot water or heated air on demand when called for by the end user, which does not depend on the technology used to heat the water or how the equipment is vented. (NEEA, No. 137 at p. 2) NEEA distinguished the present issue from DOE's prior interpretation of the ''features'' provision in the context of ventless clothes dryers, stating that ventless clothes dryers allow for the installation of a clothes dryer for certain consumers that would otherwise not be able to install a clothes dryer, whereas a condensing product can always be installed, despite a small percentage of cases where installation is complicated. (*Id.*) NBI commented that the proposed interpretation follows the precedent set in the consumer water heater rulemaking in which DOE declined to establish a separate product class for heat pump water heaters, which similarly raised questions of additional cost and complexity due to the need for installation of a condensate drain and vent changes. (NBI, No. 128 at p. 1 (*citing* 75 FR 20112, 20135 (April 16, 2010)))

In contrast, other commenters viewed DOE's proposed approach in the August 2021 NOPIR as conflicting with the Department's past precedent. For example, AHRI and IER cited the rulemaking for ventless clothes dryers as precedent for the proposition that venting provides utility. (AHRI, No. 139 at p. 4; IER, No. 138 at p. 5) IER stated that utility of a residential furnace to the consumer is not merely heated air, but also, based on the DOE's previous ruling on ventless clothes dryers, installation considerations. (IER, No. 138 at p. 5) IER also referenced DOE's prior statement that ''compact-size clothes dryers provide utility to consumers by allowing for installation in space-constrained environments.'' (IER, No. 138 at p. 5 (*citing* 76 FR 22454, 22485 (April 21, 2011))) IER asserted that this statement indicates that the utility to the consumers was not merely heated air to dry clothing, but also installation considerations. (*Id.*) IER also cited the establishment of separate product classes for package terminal air conditioners (PTACs), which address size constraints that allow for replacement units to be installed in existing wall sleeves. (*Id.*)

In their comments, AGA *et al.* drew an analogy between electric clothes dryers and non-condensing gas-fired appliances. Noting that electric clothes dryers have the benefit of fitting into consumers' apartment buildings without the need for remodeling or loss of living space, the commenter argued that such dryers provide an important utility and, accordingly, constitute a performance-related feature. (AGA *et al.,* No. 135 at pp. 26) Similarly, AGA *et al.* reasoned that natural gas appliances that function with existing chimneys and plumbing designed to accommodate non-condensing appliances likewise serve an important utility and constitute a performance-related feature. (*Id.* at pp. 26–27) AGA *et al.* went on to comment that the constraints that amounted to a performance-related feature for other appliances are too similar to the space and functional constraints of furnaces, water heaters, and boilers for that latter group of appliances not to be accorded similar treatment as performance-related features under the statute. (*Id.* at p. 27) AGA *et al.* further commented that when the Department reevaluated the standards for central air conditioners and heat pumps and packaged terminal air conditioners, the Department recognized separate classes of ''space constrained'' and ''non-standard sized'' units that differed from standard air conditioners because of their performance-related feature: their ability to accommodate the space constraints of many homes and apartments. (*Id.* at p. 24) According to the commenter, the Department cannot consider space and functional constraints a ''performance-related feature'' justifying separate standards for those products, but deny equal treatment to those furnaces, water heaters, and boilers facing similar constraints. (*Id.* at p. 27) AGA *et al.* opined that an appliance provides a consumer limited or no utility if it can only be used after renovating their home or business. (*Id.* at p. 26)

AGA *et al.* and AHRI further submitted that the furnace fans rulemaking is also relevant precedent in support of a requirement for the establishment of separate product classes, given that DOE recognized that condensing and non-condensing furnaces present significant design differences that warrant different product classes for furnace fans in that proceeding. As the commenters point out, use of condensing versus non-condensing technology was one of the distinguishing factors in the furnace fans product classes adopted by DOE. (AGA *et al.,* No. 135 at pp. 25–26; AHRI, No. 139 at pp. 3–4)

In response to these comments, DOE does not find any tension or inconsistency between its prior application of the ''features'' provision and the interpretation adopted in this document (*i.e.,* the technology used to supply heated air or hot water (and the associated venting) is not a performance-related ''feature'' that provides a distinct consumer utility). The present case of non-condensing gas-fired residential furnaces and commercial water heaters is distinguishable from certain other products cited by commenters (*i.e.,* ventless and compact clothes dryers, space-constrained central air conditioners, and furnace fans) for the reasons that follow.

Regarding ventless clothes dryers, DOE recognizes that there may be some parallels between those appliances and the noncondensing furnaces and water heaters at issue here (particularly regarding problematic installation situations), but the Department would once again clarify that the circumstances surrounding these two sets of appliances are distinguishable. Those different circumstances lead to different results when DOE is interpreting EPCA's ''features'' provision. Stated simply, DOE found

that in the case of ventless clothes dryers, a substantial subset of consumers (*e.g.,* high-rise apartment dwellers) would be deprived of the benefits of a having clothes-drying appliance in their residence entirely unless DOE established a ventless clothes dryers product class. In contrast, DOE has determined that, even in difficult installation situations, consumers would not be deprived of heat or hot water absent product/equipment classes set at a noncondensing level. Instead, the latter group of consumers facing difficult installation situations have options, including available technological solutions (albeit sometimes costly, if they seek to continue using a gas-fired appliance) or products that they can substitute (*i.e.,* electric appliances), such that they will continue receiving the benefits of heat and hot water. Again, the heat and hot water provided would be indistinguishable to consumers regardless of the technology supplying them. As explained further in the paragraphs that follow, this understanding drives the different regulatory outcomes for residential clothes dryers, as compared to residential furnaces and commercial water heaters.

The clothes dryer situation was explained in detail in a direct final rule (DFR) published in the **Federal Register** on April 21, 2011. 76 FR 22454. In that rulemaking, DOE also referenced and relied on the details presented in the associated TSD accompanying that rulemaking. 76 FR 22454, 22485 (April 21, 2011). In that TSD, DOE explained that ventless clothes dryers can be installed in locations where vented dryers would be precluded due to venting restrictions, and the Department went on to note how a clothes dryer is vented is not simply an issue of initial installation cost or a consumer choosing one product type over another (*i.e.,* if a ventless clothes dryer were not available, no clothes dryer would be available for certain locations).[11] A prime example that DOE considered was high-rise apartment buildings, some of which may be constructed without dedicated or otherwise accessible venting for a clothes dryer. Subsequent installation of additional venting in those situations would be infeasible in those situations, so if a traditional dryer were the only option, such consumers would be deprived of the benefit of having a clothes-drying capability in their homes. Thus, the ventless configuration goes to the heart of the function of the product—it allows the dryer to operate where otherwise a consumer could not have a clothes dryer—so absent the availability of a ventless clothes dryer, some consumers would not be able to have a clothes dryer at all. With that in mind, DOE examined the design and operational parameters of ventless clothes dryer models to understand their energy efficiency potential and cost structure, in order to develop appropriate energy conservation standards pursuant to EPCA that would ensure preservation of the relevant performance-related feature (*i.e.,* ventless operation). In the TSD for the April 2011 DFR, DOE explained how ventless operation inherently limits the energy efficiency of those appliances, so in the end, the agency set separate classes on that basis.[12]

The present case of residential furnaces and commercial water heaters is quite different. Unlike consumers of ventless dryers, consumers facing the prospect of replacing a non-condensing residential furnace or commercial water heater with a condensing furnace or water heater do have options available to either modify existing venting or install a new venting system to accommodate a condensing furnace or water heater, or to install a feasible alternative to have heated air or water provided (*i.e.,* an electric appliance). In all cases, the consumer would not be precluded access to heated air or water, a result which is distinctly different from the one at issue in the ventless clothes dryers example. Given the ongoing availability of the consumer benefits of heat and hot water and for the reasons explained elsewhere in this document, DOE finds it reasonable to once again conclude that the technology used to supply heated air or water is not a performance-related feature under EPCA as would justify establishing separate product/equipment classes on that basis. In light of those available options, DOE finds it appropriate to address the matter of difficult furnace and water heater installations in the economic analysis of energy conservation standards rulemakings for those individual appliances.

With regard to compact clothes dryers, the ''compact'' delineation relates directly to the size and capacity of the product—two attributes explicitly listed in the ''features'' provision. (*See* 42 U.S.C. 6295(o)(4)) This difference in size and capacity is recognized by the consumer in operation of the product (*i.e.,* by limiting the amount of wet clothes which can be processed per cycle). Moreover, DOE determined that compact-size clothes dryers have inherently different energy consumption than standard-size clothes dryers. 76 FR 22454, 22485 (April 21, 2011).

In establishing a separate product class for space-constrained central air conditioners, DOE recognized the space constraints faced by these products and that the efficiency of such products is limited by physical dimensions that are rigidly constrained by the intended application. 76 FR 37408, 37446 (June 27, 2011). Space-constrained central air conditioners have an indoor or outdoor unit that is limited in size due to the location in which the unit operates. As a result, space-constrained central air conditioners lack the flexibility of other central air conditioners to increase the physical size of the unit, thereby limiting the ability of space-constrained units to achieve improved efficiency through use of a larger coil. *Id.* In establishing standards for space-constrained central air conditioners, DOE discussed the expense of modifying an exterior opening to accommodate a larger unit, but such discussion did not abrogate DOE's determination that space-constrained central air conditioners provide centralized air conditioning in locations with space constraints that would preclude the use of other types of central air conditioners. *Id.* In contrast, the subject non-condensing residential furnaces and commercial water heaters are not significantly different in overall footprint, size, or heating capacity from their condensing counterparts[13] (although the composition of the venting used may be different), and the energy efficiency differences are a result of the technology used, a design parameter that is dictated by considerations other than size.

With regard to the equipment classes for PTACs, in its prior rulemaking, DOE found that the size of the heat exchanger directly affects the energy efficiency of the equipment. 73 FR 58772, 58782 (October 7, 2008). Like space-constrained central air conditioners, the

[11] Technical Support Document: Energy Efficiency Program for Consumer Products and Commercial and Industrial Equipment: Residential Clothes Dryers and Room Air Conditioners, pp. 3–6 (Available at: *www.regulations.gov/document?D=EERE-2007-BT-STD-0010–0053*).

[12] DOE explained that due to the lack of a vent to expel moisture-laden exhaust air to the outdoors, ventless clothes dryers produce a wastewater stream that can be either collected in an integrated storage container or discharged down an available household drain. The Department acknowledged that the process of condensing the moisture out of the recirculated air results in higher energy consumption by a ventless dryer as compared to a conventional (*i.e.,* vented) dryer. 76 FR 22454, 22470 (April 21, 2011).

[13] As provided in footnote 10 *supra.,* DOE surveyed the dimensions of representative commercial water heaters (100 gallon, 200,000 Btu/hour) and found the height and diameter dimensions comparable.

location of operation of a PTAC directly influences the size of the equipment, which impacts the size of the heat exchanger and has a corresponding direct effect on the energy efficiency of the equipment. *Id.* DOE acknowledged the potentially high costs that would be associated with installing a non-standard sized PTAC in an existing building due to the need to increase the wall opening (*i.e.,* the wall sleeve) in which a replacement PTAC is installed. *Id.* As explained in a subsequent rulemaking for PTACs, DOE further clarified that it accounts for installation costs in the life-cycle cost (LCC) and payback period (PBP) analyses used to evaluate increased standard levels, which is a separate and distinct consideration from whether separate product classes are justified. 80 FR 43162, 43167 (July 21, 2015). Consideration of installation costs in the LCC and PBP analysis used for evaluating an increased energy conservation standard level is consistent with the application of 42 U.S.C. 6295(o)(4) and 42 U.S.C. 6295(q)(1) in the final interpretation adopted in this document.

The furnace fan product classes also are not an analogous comparison to residential furnaces and commercial water heaters that rely on non-condensing technology. Furnace fans are electrically-powered devices used in consumer products for the purpose of circulating air through ductwork. 10 CFR 430.2. A furnace fan operates to allow the furnace in which it is installed to function. The references to condensing and non-condensing in the furnace fan product classes do not reflect a difference in utility between condensing and non-condensing furnaces, but rather reflect the differences between the operation of a furnace fan installed in a condensing furnace as compared to a furnace fan installed in a non-condensing furnace. In establishing the energy conservation standards for furnace fans, DOE differentiated between furnace fan product classes based on internal structure and application-specific design differences that impact furnace fan energy consumption. 79 FR 38130, 38142 (July 3, 2014). The internal structures encountered differ for a furnace fan installed in a condensing furnace, as compared to a furnace fan installed in a non-condensing furnace. The presence of an evaporator coil or secondary heat exchanger, as in a condensing furnace, significantly impacts the internal structure of an HVAC product, and in turn, the energy performance of the furnace fan integrated in that HVAC product. *Id.* These differences result in different energy use profiles for furnace fans installed in condensing furnaces, as compared to furnace fans installed in non-condensing furnace, which justifies the separate product classes.

For the reasons presented in the August 2021 NOPIR and the preceding paragraphs, DOE has determined that its historical interpretation—that utility is properly determined through an assessment of the benefits and usefulness that the feature provides to the consumer while interacting with the product—is the better reading of EPCA. The differences in cost or complexity of installation between products/equipment with different heat exchanger technology (*i.e.,* non-condensing or condensing) and associated venting do not constitute a performance-related feature under 42 U.S.C. 6295(o)(4), as would justify separating the products/equipment into different product/equipment classes under 42 U.S.C. 6295(q)(1). As discussed in the following section, this approach is consistent with EPCA's requirement for a separate and extensive analysis of economic justification for the adoption of any new or amended energy conservation standard (*see* 42 U.S.C. 6295(o)(2)–(3); 42 U.S.C. 6313(a)(6)(A)–(C); 42 U.S.C. 6316(a)).

B. Cost and Installation Considerations

The Department acknowledges that, in its January 2021 Final Interpretative Rule, it extended its view of consumer utility of residential furnaces and commercial water heaters beyond those appliances' primary function of providing heated air or water, giving considerable weight to installation situations that could require the addition of new pipes or venting to the usable space of a home or business, major modifications to a utility room, or encroachment upon an existing window or patio. 86 FR 4776, 4786 (Jan. 15, 2021).

However, differences in cost or complexity of installation between different methods of venting (*e.g.,* category IV venting for a condensing furnace versus category I venting for a non-condensing furnace) do not make any method of venting a performance-related feature under 42 U.S.C. 6295(o)(4), as would justify separating the products/equipment into different product/equipment classes under 42 U.S.C. 6295(q)(1). DOE has come to see the issues underlying the January 2021 Final Interpretive Rule more appropriately framed as matters of cost. This view is consistent with EPCA's requirement for a separate and extensive analysis of economic justification for the adoption of any new or amended energy conservation standard (*see* 42 U.S.C. 6295(o)(2)–(3); 42 U.S.C. 6313(a)(6)(A)–(C); 42 U.S.C. 6316(a)). DOE stated in the August 2021 NOPIR that the proposed interpretation would return the issues underlying the January 2021 Final Interpretive Rule to their proper sphere as part of DOE's economic analysis in individual energy conservation standards rulemakings. 86 FR 48049, 48053 (August 27, 2021).

Once again, commenters had mixed views on the change in position outlined in the August 2021 NOPIR, with some in favor and others opposed to DOE's proposed modified approach. Among those in favor, ASAP *et al.* stated that that non-condensing technology (and associated venting) does not provide unique utility to consumers separate from an appliance's function of providing heated air or water and that the cost impacts are appropriately considered in the context of individual rulemakings, which can consider the specific circumstances of each product. (ASAP *et al.,* No. 143 at p. 2)

The Institute for Policy Integrity commented that in making a ''feature'' determination, DOE should consider consumer utility as separate from any cost considerations, any technological advances that could resolve the current challenges, and any benefits of fuel switching. (Institute for Policy Integrity, No. 145 at p. 1) CEC commented that the ''features'' provision makes no mention of cost as a relevant consideration and that such factors are properly considered during the evaluation of a proposed standard level's economic justification. (CEC, No. 134 at p. 3)

NRDC *et al.* commented that, while condensing technologies may require additional installation costs, there are alternatives that can make condensing technologies work within the existing space. NRDC added that it would be more appropriate to incorporate increased installation costs associated with condensing technologies in the life cycle cost and payback period analyses in energy conservation standards rulemakings. (NRDC *et al.,* No. 144 at pp. 1–2)

The State Attorneys General commented that any differences in cost or complexity of installation between different methods of venting for condensing and non-condensing products are more properly considered as part of the DOE's economic analysis in individual energy conservation standards rulemakings. (State Attorneys General, No. 136 at p. 3) These commenters stated that any potential

additional costs associated with condensing products are not an independent basis for establishing separate product classes subject to differing efficiency standards. (*Id.*)

A.O. Smith commented that it is technologically feasible to replace a non-condensing gas-fired water heater with a condensing gas-fired water heater in all circumstances, but that there are certain instances where it is cost prohibitive to do so. To address such circumstances, A.O. Smith recommended that DOE expand the economic analysis for different subgroups with specific installation considerations as part of any future substantive rulemaking on efficiency standards. (A.O. Smith, No. 133 at p. 9) Similarly, ASAP *et al.* recommended that the Department consider impacts on low-income populations, because low-income households are disproportionally renters, and, therefore, are responsible for the higher energy costs of less-efficient technologies, and not the cost of the system itself. (ASAP *et al.,* No. 143 at p. 3)

A.O. Smith and the Institute for Policy Integrity commented that the January 2021 reinterpretation of the ''features'' provision double-counts the economic impact of certain costs as compared to the efficiency gains, in that installation issues would be considered in terms of both utility and the economic analyses. (A.O. Smith, No. 133 at p. 4; Institute for Policy Integrity, No. 145 at pp. 2, 3)

Turning to the commenters opposed to DOE's proposed change in approach, IER disagreed with the DOE's tentative finding that the issues sought to be addressed by the January 2021 Final Interpretative Rule were based on cost. (IER, No. 138 at p. 3) IER urged DOE to explain why the final interpretive rule was ''framed as a matter of cost'' when DOE stated in the January 2021 Final Interpretive Rule that the decision was not based on the cost of the feature. (*Id.* at p. 4)

AGA *et al.* stated that economic justification is a separate consideration and that EPCA should be read in a manner that gives meaning to all its provisions. (AGA *et al.,* No. 135 at pp. 18–19) AGA further commented that reading ''performance related-features'' to include those features that make a product useful for its intended purpose flows from the meaning and context of several provisions of EPCA, including that: (1) Energy conservation standards must be technically feasible for their intended application; (2) covered products should be subcategorized into classes to recognize different functions, consumer needs, and fuel types; (3) standards should not render covered products unavailable to American consumers; and (4) the Department should recognize ''performance-related features'' that make a product useful to consumers. (AGA *et al.,* No. 135 at pp. 17–18) In addition, AGA reasoned that viewing physical, technical, architectural, and code constraints as purely economic considerations fails to give meaning to the entire purpose behind establishing separate classes of consumer products based on their ''performance-related features.'' (AGA *et al.,* No. 135 at p. 18)

AGA *et al.* asserted that the proposed interpretation in the August 2021 NOPIR could render non-condensing natural gas furnaces, commercial water heaters, and boilers unavailable to millions of Americans whose homes and businesses cannot accommodate the alternative, condensing appliances without significant complications and, in many cases, renovation. (AGA *et al.,* No. 135 at p. 2) These commenters stated that when viewed in that light, non-condensing units provide an important performance-related feature in that they work with the homeowner's or business's existing utility structure venting system. (*Id.* at p. 6) AGA *et al.* argued that an evaluation of the factors for economic justification would show standards based on condensing technology to be economically unjustified in many applications. (*Id.* at p. 17)

Bradford White commented that although energy conservation standards at condensing levels would likely benefit their company, it predicted that eliminating non-condensing technologies from the market would impact both installers and consumers negatively, with there being circumstances where condensing gas-fired water heaters could not be used, either due to installation challenges or increased cost. (Bradford White, No. 146 at p. 1)

Crown Boiler, New Yorker Boiler, and U.S. Boiler asserted that DOE itself acknowledged problems with sole reliance on the economic justification during promulgation of the current rule (*i.e.,* the January 2021 Final Interpretive Rule), including that: Subsets of the population (particularly low-income people in urban areas) may be disproportionately impacted by these costs, thereby resulting in consumers keeping unsafe equipment in service, installing the condensing equipment in unsuitable venting systems, or switching to less comfortable, more expensive, less safe forms of heat (*e.g.,* resistance electric or kerosene space heaters); and the economic analysis cannot quantify consumer burdens that are associated with building modifications to accommodate venting, such as loss of interior space, loss of decks, aesthetic changes, etc. (Crown Boiler, No. 127 at p. 2; New Yorker Boiler, No. 130 at p. 2; U.S. Boiler, No. 129 at p. 2)

Kramer commented that the ''non-condensing'' feature of furnaces should be preserved to avoid economic burden for low-income households for which the installation of a condensing furnace is not feasible due to the current location of the installed unit and the costs associated with changing ductwork or upgrading electric services to accommodate a condensing unit. (Kramer, No. 124 at p. 1)

HARDI commented that for existing homes, the need to change the venting system to install a condensing furnace leads to modifications to the living space that are unnecessary if the equipment is replaced with a non-condensing furnace or water heater. The commenter also stated that non-condensing furnaces and water heaters likewise obviate the need for a consumer to install heat-tape and other freeze mitigation equipment used to prevent the freezing of condensate in the vent and without which, there could be resulting damage to the furnace or water heater. Finally, HARDI argued that for consumers with heating equipment that is only in use part-time, the need to constantly heat the venting system would be impractical. (HARDI, No. 142 at p. 2)

DOE acknowledges that the interpretation adopted in this final interpretive rule is a departure from the January 2021 Final Interpretative Rule. The interpretation adopted in this document, which reverts to DOE's historical interpretation, gives meaning to the ''features'' provision in the context of EPCA's direction to DOE to establish minimum levels of energy efficiency or maximum quantities of energy use for covered products and equipment when performing their intended function. Conversely, the January 2021 Final Interpretive Rule expanded the ''features'' provision to include consideration beyond the operation of a product or equipment, namely through consideration of other installation matters best characterized as cost issues. As explained previously in this document and in the paragraphs that follow, DOE has concluded that its historical interpretation is the best reading of the statute, an understanding shared by numerous commenters on the August 2021 NOPIR.

As indicated by several commenters, in certain instances, replacing a non-condensing appliance with a condensing one may involve complications, including the need for installation of new venting and renovation of existing living space. However, these installation complications are separate and apart from any performance-related impacts of the unit once installed. When properly installed, a condensing furnace or water heater would be expected to provide the consumer with heated air or water indistinguishable from that supplied by a non-condensing appliance.

DOE finds strong statutory support for its changed position. EPCA's ''features'' provision makes no mention of cost as a relevant consideration. (42 U.S.C. 6295(o)(4); 42 U.S.C. 6313(a)(6)(B)(iii)(II)(aa)) As AGA *et al.* noted, EPCA directs DOE to separately consider whether energy conservation standards would be economically justified. Therefore, DOE finds that the factors that gave rise to the January 2021 Final Interpretive Rule can be addressed through an evaluation of the factors for economic justification.

EPCA enumerates seven factors for economic justification that DOE must consider when evaluating whether to establish or amend energy conservation standards.[14] (42 U.S.C. 6295(o)(2)–(3); 42 U.S.C. 6313(a)(6)(A)–(C); 42 U.S.C. 6316(a)) Included among those factors is consideration of the savings in operating costs throughout the estimated average life of the covered product [or covered equipment] in the type (or class) compared to any increase in the price of, or in the initial charges for, or maintenance expenses of, the covered products which are likely to result from the imposition of the standard. (42 U.S.C. 6295(o)(2)(b)(i)(II); 42 U.S.C. 6313(a)(6)(B)(ii)(II); 42 U.S.C. 6316(a))

As part of evaluating this factor, DOE conducts a LCC and PBP analysis. The LCC is the total consumer expense of an appliance or product over the life of that product, consisting of total installed cost plus operating costs. The PBP is the estimated amount of time (in years) it takes consumers to recover the increased purchase cost, including installation, of a more-efficient product through lower operating costs.

In this case, DOE originally considered the additional costs associated with installing condensing residential furnaces and condensing commercial water heaters in the rulemaking proceedings for those appliances whose proposals were withdrawn in conjunction with the January 2021 Final Interpretive Rule. (*See* 81 FR 65720, 65776–65783 (Sept. 23, 2016); 81 FR 34440, 34484–34485 (May 31, 2016)) Additionally, in both the residential furnaces and commercial water heaters rulemaking proceedings, DOE conducted consumer subgroup analyses to understand the disparate impacts of the proposed standards on low-income households by analyzing the LCC impacts and PBP for those particular consumers from alternative standard levels. In these analyses, DOE used different discount rates to reflect various income categories. (*See* 81 FR 65720, 65798–65799 (Sept. 23, 2016); 81 FR 34440, 34494–34495 (May 31, 2016)) DOE has concluded that these analyses are appropriate for analyzing the impacts of potential standards on consumers generally and low-income consumers in particular.

In proposing to return to its historical interpretation, DOE furthermore added that it tentatively concluded that it gave undue weight to the arguments presented by the Gas Industry Petitioners. 86 FR 48049, 48054–48055 (August 27, 2021). After reexamining the record, DOE preliminarily determined that the qualitative arguments made by the Gas Industry Petitioners were not accompanied by sufficient evidence to establish the existence or magnitude of the alleged problem, as would support the significant change from DOE's historical interpretation to the interpretation contained in the January 2021 Final Interpretive Rule. 86 FR 48049, 48055 (August 27, 2021). To the extent that consumers would be faced with difficult installation situations, DOE tentatively concluded that consumers have other options for resolving such situations without the need for the Department to declare non-condensing technology and associated venting to be a performance-related feature under EPCA. *Id.* In short, consumers facing difficult installation situations can either: (1) Utilize a technological solution to resolve their installation problem, or (2) switch to an appliance utilizing alternative technologies. Either approach would allow those consumers with potentially difficult installation situations to choose how best to avoid loss of usable space, extensive building modifications, or extreme installation costs identified in the January 2021 Final Interpretive Rule. *Id.* With regard to specific concerns of ''orphaned'' water heaters,[15] DOE noted the development of potential technology solutions. *Id.* The Department stands by and reaffirms these conclusions in this Final Interpretive Rule. DOE has also concluded that installation professionals have the expertise to complete any necessary appliance replacements in a safe and effective fashion.

In response to these tentative findings in the August 2021 NOPIR, NEEA cited results from a study conducted by NEEA, Pacific Gas and Electric Company, National Grid, and Northeast Energy Efficiency Partnerships, which found that 5 percent or fewer of condensing gas appliance installations were challenging, and stated that, even in cases that present significant challenges, technical solutions were always possible. (NEEA, No. 137 at p. 2) The commenter referenced technologies available on the market (*i.e.,* DuraVent's FasNSeal 80/90) that it stated allow for the installation of a condensing appliance with existing venting systems and in situations with narrow lot lines, challenging clearances, or where side wall venting is not practical. (*Id.* at p. 3) NEEA suggested that such solutions allow for condensing appliance venting without the need for additional building penetrations or the need to disturb finished internal spaces. (*Id.*) Similarly, the State Attorneys General stated that based on the rulemaking record, a variety of technological fixes are available to accommodate the replacement of non-condensing units and to increase compatibility with other non-condensing appliances. (State Attorneys General, No. 136 at p. 3)

[14] Specifically, at 42 U.S.C. 6295(o)(2)(B)(i) (and with essentially the same language at 42 U.S.C. 6313(a)(6)(B)(ii)), EPCA provides: In determining whether a standard is economically justified, the Secretary shall, after receiving views and comments furnished with respect to the proposed standard, determine whether the benefits of the standard exceed its burdens by, to the greatest extent practicable, considering—(I) the economic impact of the standard on the manufacturers and on the consumers of the products subject to such standard; (II) the savings in operating costs throughout the estimated average life of the covered product in the type (or class) compared to any increase in the price of, or in the initial charges for, or maintenance expenses of, the covered products which are likely to result from the imposition of the standard; (III) the total projected amount of energy, or as applicable, water, savings likely to result directly from the imposition of the standard; (IV) any lessening of the utility or the performance of the covered products likely to result from the imposition of the standard; (V) the impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the imposition of the standard; (VI) the need for national energy and water conservation; and (VII) other factors the Secretary considers relevant.

[15] The Gas Industry Petitioners raised specific concern with the potential of an orphaned water heater. An ''orphaned water heater'' refers to the situation in which a non-condensing furnace and non-condensing water heater share a common vent, but, upon replacement of the non-condensing furnace with a condensing furnace, they can no longer share that same venting due to differences in venting requirements.

ASAP *et al.* stated that non-condensing and condensing furnaces have different venting configurations, but that these different configurations are a matter of cost and not utility, and there are a variety of solutions to challenging venting requirements. (ASAP *et al.,* No. 143 at p. 2) A.O. Smith stated that it is technologically feasible to replace non-condensing equipment in every commercial setting. (A.O. Smith, No. 133 at p. 9)

In contrast, AGA *et al.* asserted that the record for the January 2021 Final Interpretive Rule shows that for millions of applications, appliances with condensing technology would not work (or would present hazardous conditions) if the appliances were installed within existing home and business venting and plumbing systems, absent modification. (AGA *et al.,* No. 135 at p. 28) In support of its assertion, AGA *et al.* pointed to DOE's estimates that upwards of 10 percent of households with gas-fired furnaces would face difficult installation situations if non-condensing furnaces were eliminated, as well as a survey from installation contractors that AGA *et al.* stated showed that atmospheric venting systems often prevent use of condensing furnaces. (*Id.* at pp. 29, 31) AGA *et al.* argued that, although DOE claims the existence of technological solutions to difficult installation situations, no evidence is cited for that proposition. (*Id.* at p. 31) AGA *et al.* further commented that the National Fuel Gas Code (ANSI Z223.1/NFPA 54) and the International Fuel Gas Code, which are installation codes for gas appliances that are adopted and enforced in the majority of States and jurisdictions within the United States, do not permit venting a condensing type of vented gas appliances (positive venting pressure) with a non-condensing type of vented appliance (negative venting pressure) because of safety concerns. (*Id.* at p. 32) AGA *et al.* stated that, therefore, even if technological issues were overcome, replacement of non-condensing appliances with condensing appliances would still violate the aforementioned installation codes to the extent that the condensing appliance is vented in the same vent line with a negative venting pressure non-condensing appliance. (*Id.*)

AHRI commented that consumers, especially in older homes, will struggle to replace their appliances if condensing-only appliance standards are set in efficiency rulemakings. (AHRI, No. 139 at p. 1) Kramer commented that non-condensing furnaces are sometimes installed in unheated spaces such as an attic or garage, and that such locations cannot accommodate a condensing furnace because the condensation will freeze and cause damage to the heating unit. (Kramer, No. 124 at p.1) Kramer further commented that relocation of such units to the heated part of the home is cost-prohibitive due to reworking of the ductwork and would result in loss of living space inside the home. (*Id.*)

Crown Boiler, New Yorker Boiler, and U.S. Boiler stated that the research conducted by Oak Ridge National Laboratory (ORNL) referenced by DOE in the August 2021 NOPIR demonstrates that condensing furnace standards would result in a significant problem. (Crown Boiler, No. 127 at p. 3; New Yorker Boiler, No. 130 at pp. 3–4; U.S. Boiler, No. 129 at pp. 3–4) These commenters asserted that the ''EntrainVent'' technology discussed in the ORNL research cited by DOE is problematic because: (1) If the common portion of the vent becomes blocked, the condensing appliance will force flue products backwards down the category I vent and into the living space through the draft diverter and that detecting this spillage will be a significant technical challenge; and (2) this system will only work when the furnace inducer is running, meaning that water heater cannot safely operate when the furnace inducer is off. (Crown Boiler No. 127 at p. 4; New Yorker Boiler, No. 130 at pp. 4–5; and U.S. Boiler, No. 129 at pp. 4–5) Crown Boiler, New Yorker Boiler, and U.S. Boiler further commented that the use of other venting systems described in the ONRL report (*i.e.,* the DuraVent FasNSeal 80/90 and draft inducer paired with a chimney liner) is not practical in situations where there are offsets in the chimney, or where the cross-sectional area of the chimney is too small to provide adequate drafting for the water heater after the new liner(s) are added. (Crown Boiler No. 127 at p. 5; New Yorker Boiler, No. 130 at p. 5; U.S. Boiler, No. 129 at p. 5) These commenters stated that any concentric vent system consisting of a pressurized vent system inside a Category I vent system raises safety concerns because the inner pipe will be difficult or impossible to inspect and a breach in the pipe will lead to flue gas inside the building and that this problem would be particularly acute for a pipe modified with a draft inducer that was not designed to be pressurized. (*Id.*)

Bradford White commented that a non-condensing commercial gas-fired water heater installed in a high-rise building in a large, older city (*e.g.,* New York City, Boston, Chicago) would not be able to be replaced with a condensing equivalent, as it would not be able to vent horizontally due to jurisdictions prohibiting side wall venting in these applications. (Bradford White, No. 146 at p. 3) Bradford White further commented that if the mechanical room is in the basement or ground level floor of a 15-story building (and shorter in some cases), the water heater may not be certified with a long enough vent length to be able to vent vertically through the building's roof, and that if the venting had to run up through current living spaces, there would be impacts to the building space. (*Id.*)

AGA *et al.* and APGA *et al.* stated that, in the current market, the known solutions often require making major reconfigurations to building venting and plumbing systems. (AGA *et al.,* No. 135 at p. 18; APGA *et al.,* No. 140 at p. 9) APGA *et al.* stated that most of the existing buildings in which gas furnaces and water heaters are installed were architecturally designed to accommodate standard atmospherically-vented products and have built-in atmospheric venting systems to serve such products, often with vents sized to serve two or more commonly-vented products. (APGA *et al.,* No. 140 at p. 8) APGA *et al.* commented that there are instances when it is possible to use existing venting when switching from non-condensing to condensing technologies or to scrap the existing venting and run new venting through the same chase, but there are many common scenarios in which this would not be possible (*Id.* at p. 7) APGA *et al.* further commented that if atmospherically-vented products were unavailable, replacement of an existing atmospherically-vented product would require building modifications to facilitate the installation of condensing products in buildings that were not designed to accommodate them and potentially a relocation of the heating system, which would result in orphaned venting infrastructure. (*Id.* at pp. 7, 8)

Bradford White commented that DOE should not base its analysis on a technology that is not currently commercially available (*i.e.,* venting technologies that could make it easier to switch from noncondensing to condensing appliances). (Bradford White, No. 146 at p. 2)

AHRI stated that there is no justification or evidence provided by DOE for its statements regarding the existence of technological solutions for gas-fired installation issues, orphaned water heaters, or other issues raised by the gas industry petition that would support the Department's proposed policy change. (AHRI, No. 139 at p. 2) The commenter argued that requiring new venting for condensing

technologies would be inhibited by safety and building codes, providing, as an example, building types and jurisdictions in which side wall vents necessary for condensing units are prohibited or not feasible. (*Id.*) AHRI claimed that if a consumer cannot install a piece of equipment due to venting constraints, there will be no consumer access to heated air or water. (*Id.*) Furthermore, AHRI stated that upgrading to condensing equipment, upgrading electrical panels for heat pump use, and modifications for the safe use of an orphaned water heater come at a price that disproportionally affects underserved households and small businesses. (*Id.* at p. 4)

As discussed previously, installation costs are addressed in the LCC and PBP analyses, as well as in consumer subgroup-specific analyses. These analyses account for the cost of difficult (*i.e.,* unusually costly) installations, including those subgroups of the population that may be differentially impacted by DOE's consideration of amended energy conservation standards. In the September 2016 Furnace SNOPR, DOE's analysis assumed that when replacing a non-condensing gas furnace with a condensing gas furnace in replacement applications, additional costs could include adding a new polyvinyl chloride (PVC) flue venting, PVC combustion air venting, concealing vent pipes, addressing an orphaned water heater (by updating flue vent connectors, vent resizing, or chimney relining), and condensate removal. Additionally, in the installation costs in new construction installations, DOE's cost estimates for condensing gas furnaces included appropriate flue vents, combustion air venting for direct vent installations, accounting for commonly-vented water heaters, and condensate removal. 81 FR 65720, 65776–65783 (Sept. 23, 2016). In that rulemaking, DOE estimated that a certain percentage of all installation scenarios would incur extra costs to replace a non-condensing furnace with a condensing furnace and ascribed additional installation costs to address a number of installation scenarios, including scenarios in which venting is replaced.[16] Similarly, venting cost estimates for condensing commercial water heaters accounted for the type of installation (new construction or retrofit), draft type (atmospheric venting or power venting), water heater fuel type, building vintage, number of stories, and presence of a chimney. 81 FR 34440, 34484 (May 31, 2016). The materials and diameters of venting analyzed depended on the type of installation. A fixed percentage of buildings were estimated to have masonry chimneys that would require relining. *Id.* In applying the interpretation adopted in this document to future energy conservation standards for residential furnaces, commercial water heaters, and similarly-situated products/equipment, DOE expects to employ similar analytical methods.

With respect to concerns raised regarding the safety of the venting technologies evaluated by ORNL, DOE reiterates that the evaluated technologies are discussed in the August 2021 NOPIR only as examples of potential solutions that could emerge to mitigate installation issues related to venting, ones whose development could be hampered by the interpretation provided in the January 2021 Final Interpretive Rule. DOE notes that the EntrainVent evaluated by ORNL was a proof-of-concept designed to demonstrate key functionality, rather than a commercially-available product, and as such, it had not incorporated additional safety-related features (*e.g.,* controls and sensors) that would not impact ordinary operation. DOE did not consider this technology solution in its analysis of furnace standards for the September 2016 Furnaces SNOPR. DOE did analyze the DuraVent product as part of an alternative case.[17]

DOE would point out that the DuraVent FasNSeal 80/90 is a commercially-available product intended for a similar purpose (*i.e.,* to allow condensing products to be concentrically vented with a non-condensing, atmospheric product venting through an existing vent) and which is listed to the applicable Underwriters Laboratories' safety standards, indicating that it can be used safely when installed as intended. DOE also notes other commenters stated that replacement of non-condensing units with condensing units is possible in all cases, indicating that there are not building code prohibitions on such replacements. (*See* NEEA, No. 137 at p. 2; A.O. Smith, No. 133 at p. 9)

As stated, DOE acknowledges that installation of condensing products/equipment requires modifications to the installed space in some applications and that such modifications may impact the installation cost and/or complexity. As illustrated by the analyses conducted in the prior rulemakings for residential furnaces and commercial water heaters, such costs and complexities can be and have been addressed as part of DOE's evaluation under EPCA's factors for determining whether new or amended standards would be economically justified. To the extent that commenters raised concern regarding the practicability and safety of certain developing technologies that address the orphaned water heater issue, DOE notes that its analysis for the prior residential furnaces rulemaking accounted for the potential of separate venting, limiting consideration of such developing technology to a sensitivity analysis.[18]

Installation costs may influence consumer decisions regarding fuel choice, and, at any time, a segment of consumers may choose replacement products that rely on a different fuel source than that of the unit being replaced. In a limited number of cases, a consumer facing a difficult installation situation may decide it to be impracticable (due to cost or other considerations, including local safety and building codes as suggested by Bradford White and AHRI) to replace a product with another that relies on the same fuel source. In such cases, the consumer may choose to replace the existing appliance with one utilizing a different fuel type as another viable solution. However, the mere potential for fuel switching does not serve as the basis for establishment of a performance-related feature under EPCA.

As discussed in the August 2021 NOPIR, a consumer may replace a gas-fired furnace or water heater with an electric heat pump or water heater, thereby obviating the need for extensive changes to existing venting. 86 FR 48049, 48055–48056 (August 27, 2021). Consumers routinely make such choices, where they deem it appropriate, which reflects economic decision-making. Installation of an electric heat pump or water heater would provide the consumer with heated air or hot water, respectively, without the loss of usable space or aesthetics because it would obviate the need to make significant changes to the residential or commercial space. An electric heat pump or water heater would also be an option to provide the consumer with heated air or hot water,

[16] See Table 8D.2.19 in Appendix 8D of the TSD for the September 2016 Furnace SNOPR (Available at: *regulations.gov* at Docket No. EERE–2014–BT–STD–0031–0217).

[17] See Appendix 8L of the TSD for the September 2016 Furnaces SNOPR (Available at: *regulations.gov* at Docket No. EERE–2014–BT–STD–0031–0217).

[18] See Appendix 8D of the TSD for the September 2016 Furnaces SNOPR (Available at: *www.regulations.gov* at Docket No. EERE–2014–BT–STD–0031–0217).

respectively, were a condensing product to present a difficult installation situation. Stated another way, neither the desire to maintain a home's or business's current aesthetics and space configuration, nor the prospect of a difficult installation, would prevent a consumer from having heated air or water because in those instances an electric heat pump or electric water heater could be installed.

Commenters offered a variety of views on the topic of fuel switching. The CA IOUs expressed their belief that fuel switching will occur in the market regardless of whether standards are changed, and that fuel switching should not be a rationale for designating non-condensing technologies as a feature. (CA IOUs, No. 141 at p. 3)

NRDC *et al.* commented that fuel switching from gas to electric is not a rationale that EPCA recognizes as a reason for classifying a technology as a feature and it should not prevent DOE from adopting a condensing standard. NRDC noted that in performing its economic analysis, DOE should account for such impacts, consistent with the Department's practice in prior rulemakings. (NRDC *et al.,* No. 144 at p. 2)

CEC commented that EPCA does not authorize DOE to limit energy conservation standards to allow for the inefficient consumption of energy by certain fuel types; instead, standards must be ''designed to achieve the maximum improvement in energy efficiency that the Secretary determines is technologically feasible and economically justified.'' (CEC, No. 134 at p. 4)

The State Attorneys General stated that nothing in EPCA precludes fuel switching, as long as DOE's standard would not eliminate the appliance of that fuel type entirely, and the commenters suggested that a consumer facing difficult installation could replace a gas-fired appliance with an electric unit to eliminate the need for extensive changes to existing venting. (State Attorneys General, No. 136 at p. 3) The State Attorneys General and ASAP *et al.* stated that fuel switching is a natural part of market operation for the subject appliances. (State Attorneys General, No. 136 at p. 3; ASAP *et al.,* No. 143 at p. 3) The State Attorneys General further stated the mere potential for fuel switching should not serve as the basis for establishment of a performance-related feature under EPCA. (State Attorneys General, No. 136 at p. 4) ASAP *et al.* stated that the costs and benefits of switching to an electric heat pump can and should be evaluated as part of DOE's economic analysis when considering new or amended energy conservation standards, as the Department has done in prior rulemakings. (ASAP *et al.,* No. 143 at p. 3)

The Institute for Policy Integrity commented that the rulemakings would likely cause a small amount of fuel switching, but that theorizing about the extent of this impact would unnecessarily suggest that there is a ''threshold'' that violates EPCA. (Institute for Policy Integrity, No. 145 at pp. 1, 7) The commenter argued that ''fuel-type'' is not explicitly listed among the traits that standards may not make unavailable. (*Id.* at p. 6) In addition, the Institute for Policy Integrity suggested that the subset of consumers who would face aesthetically undesirable installations of condensing units maintain the option of relying on technological solutions or switching to a heating appliance based on a different fuel source to avoid those unwelcome changes, thereby maintaining the aesthetic of their space. (*Id.* at p. 5)

In contrast, APGA *et al.* commented that DOE's ''fuel switching'' analysis is inconsistent with the statutory direction that any consumer impacts as a result of standards must be economically justified, but, according to these commenters, the analysis framed fuel switching as a means to avoid the changes in building design associated with a condensing standard, and fuel switching is used as a means to justify the costs of switching to a condensing system. (APGA *et al.,* No. 140 at pp. 14–15) These commenters further stated that DOE's analysis underestimates the extent to which the previously proposed standards would lead to fuel switching. (*Id.*)

AGA *et al.,* citing 42 U.S.C. 6295(f)(1)(B)(iii), commented that Congress, in directing DOE to finalize standards for certain furnaces built after January 1, 1992, recognized that separate standards would be appropriate based on fuel and performance-related features and that Congress explicitly established separate standards for gas, oil, and electric furnaces (among others). (AGA *et al.,* No. 135 at p. 13) AGA *et al.* further referenced EPCA's direction to issue separate standards for classes of products that ''consume a different kind of energy'' (*i.e.,* type of fuel) than ''other covered products within such type'' and to issue separate standards for classes of products that have ''a performance-related feature which other products within such type (or class) do not have [.]'' (*Id.* at p. 14) AGA *et al.* asserted that these provisions, read together with the ''features'' provision, make clear that EPCA forecloses a standard that would force consumers to switch fuels or make natural-gas products unavailable to consumers who want to buy them for reasons beyond economics. (*Id.* at p. 22)

AGA *et al.* additionally commented that if the DOE has evidence to support the expectation that the proposal will not lead to significant fuel switching, it should be included in the proposal to allow stakeholders a meaningful opportunity to comment. (*Id.* at p. 32) Crown Boiler, New Yorker Boiler, and U.S. Boiler asserted that DOE has not addressed its prior determination in the January 2021 Final Interpretive Rule that some enhanced level of fuel switching would occur. (Crown Boiler, No. 127 at pp. 3–4; New Yorker Boiler, No. 130 at p. 4; U.S. Boiler, No. 129 at p. 4) Crown Boiler, New Yorker Boiler, and U.S. Boiler suggested that fuel switching will result in a loss of reliability for many consumers since electric products are only as reliable as the electric grid they are connected to. (Crown Boiler, No. 127 at p. 4; New Yorker Boiler, No. 130 at p. 4; U.S. Boiler, No. 129 at p. 4)

Bradford White stated that DOE appeared to put a fair amount of weight in past trends related to fuel switching continuing to be representative of what will occur in the future, but the commenter disagreed with any such assumption because it argued that significant activity at the State and local levels is driving all parties to shift to primarily electric products. (Bradford White No, 146 at p. 2)

AGA *et al.* commented that some consumers may have no choice other than to switch to an electric appliance if it is untenable or infeasible, regardless of cost, to replace their non-condensing appliances with condensing ones, citing concerns ranging from aesthetics to functionality of living spaces. (AGA *et al.,* No. 135 at p. 21) Bradford White commented that while electric water heaters can be used to provide hot water, there are challenges with using them in place of commercial gas water heaters. According to Bradford White, some of the limitations or problems to overcome include, but are not limited to, slower recovery rates, maximum temperature settings on heat pump water heaters, and panel and outlet upgrades needed to handle the necessary amp draw. (Bradford White, No. 146 at p. 3)

Kramer commented that a fuel change to an electric unit is very frequently not economically feasible for lower income clients due to necessary electrical upgrades. Kramer elaborated that if the home only has 60 or 100 amp service, a breaker panel and electric meter

upgrade is necessary, which costs $2000 to $3000. (Kramer, No. 124 at p. 1)

GEUAG asserted that the proposed interpretive rule constrains fuel choice and is, therefore, incompatible with the law and detrimental to consumers. (GEUAG, No. 132 at p. 3) GEUAG commented that the alternatives of electric resistance and heat pumps typically resort to electric resistance when cold weather conditions exist, negating much of the claimed benefit and putting lives at risk in extreme temperature events, asserting that grid reliability becomes an issue when switching to electric. (*Id.* at pp. 13–14)

Once again, in response to these comments, DOE does not find potential fuel switching to be a basis to support a determination that non-condensing technology and associated venting constitute a performance-related feature. As stated in the August 2021 NOPIR, nothing in EPCA precludes such effects, as long as DOE's standard would not eliminate the appliance of that fuel type entirely. 86 FR 48049, 48056 (August 27, 2021). In this case, interpretation of EPCA's ''features'' provision that maintains non-condensing and condensing units under a single class of product or equipment would not eliminate residential furnaces or commercial water heaters that rely on natural gas, propane, or other any other fuel type, from the U.S. market. Notably, both non-condensing and condensing units rely on natural gas and propane as the fuel source. The interpretation adopted in this document would continue to preserve consumer choice, which DOE understands to be influenced by a variety of considerations, including market conditions, such as fuel prices. The final interpretive rule adopted in this document allows consumers to make the choice of when market forces (and installation costs) warrant replacement of a gas-fired appliance with a comparable electric appliance.

It bears noting that while EPCA recognizes that various fuel types exist in the appliance marketplace and provides certain protections, the statute itself does not act, nor does it mandate, that DOE take regulatory action to preclude such marketplace effects, except in limited cases expressly defined. In certain areas, Congress set statutory energy conservation standard levels for products, such as consumer water heaters (*see* 42 U.S.C. 6295(e)(1)) and consumer boilers (*see* 42 U.S.C. 6295(f)(3)), based on fuel type (*e.g.,* gas, oil, electricity). EPCA also recognizes differences in fuel type under 42 U.S.C. 6295(q)(1)(A), which provides for setting separate classes where appliances consume a different kind of energy from that consumed by other covered products within such type (or class).

Where Congress required DOE to consider the potential impacts of fuel switching, it stated so explicitly. Congress directed DOE to prescribe a final rule not later than January 1, 1989, to establish an energy conservation standard for certain furnaces, *i.e.,* furnaces (other than furnaces designed solely for installation in mobile homes) having an input of less than 45,000 Btu per hour and manufactured on or after January 1, 1992, which DOE determined not likely to result in a significant shift from gas heating to electric resistance heating with respect to either residential new construction or furnace replacement. (42 U.S.C. 6295(f)(1)(B)(i) and (iii)) This consideration of fuel switching was specific to smaller-capacity furnaces, rather than being placed in a more general provision of broader applicability. Further, this explicit direction to consider fuel switching did not preclude *any and all* fuel switching, only significant fuel shifting from gas to electric resistance heating.

Conversely, ECPA's ''features'' provision at 42 U.S.C. 6295(o)(4) does not include fuel type within its ambit. Thus, Congress structured EPCA to recognize fuel-type distinctions and to create a level playing field, while balancing the need for overall energy savings. For these reasons, DOE finds the positions of GEUAG, AGA *et al.,* and other commenters expressing similar views on DOE's statutory obligations regarding fuel switching to be an overly broad reading that the statutory text cannot support.

Regarding the concerns raised by commenters about the safety of fuel switching and grid reliability, DOE notes that modern gas-fired central furnaces also require electricity to operate and would, therefore, be rendered inoperable during a power outage without an appropriately-sized back-up generator. Thus, while grid reliability may be a legitimate societal concern, it is not limited to any one specific fuel type.

In response to concerns about using commercial electric water heaters in place of commercial gas-fired water heaters, DOE has concluded that solutions are available to resolve the potential issues raised by commenters. For example, DOE notes that issues related to the maximum temperature setting on a heat pump water heater could be mitigated by utilizing electric resistance heating as a backup or supplementary source to reach the desired outlet temperature. The concerns raised about the panel and outlet upgrades needed to handle the increased amp draw are appropriately considered as installation costs. Finally, the recovery rate will largely be a function of the rate at which the water heater provides heat to the water, so sizing an electric water heater with a heating rate comparable to that of the gas-fired water heater it is replacing should not result in any loss of recovery ability.

Regarding the prevalence of fuel switching, DOE has typically found fuel switching to occur in a small number of cases in any given rulemaking, and the Department takes this potential into account as part of the analyses conducted to determine whether amended standards would be economically justified. For example, in the September 2016 Furnaces SNOPR, DOE estimated the percentages of consumers that would switch from a residential non-weatherized gas furnace to either a residential heat pump or electric furnace, and from a commercial gas-fired water heater to a commercial electric water heater (as a result of the existing gas-fired water heater being ''orphaned'') that would occur under the various potential amended standards scenarios under consideration.[19] Similarly, in the May 2016 Commercial Water Heaters NOPR, DOE considered the potential for fuel switching from gas to electric water heating equipment and tentatively concluded that fuel switching was very unlikely for both storage and instantaneous water heaters. Therefore, DOE did not explicitly include fuel switching in its analyses for that rulemaking. 81 FR 34440, 34494–34495 (May 31, 2016). DOE has determined its analytical methodologies to provide a robust assessment of potential fuel switching, and the Department stands by its results. Although the gas industry commenters have faulted these methodologies in the past for a variety of reasons, DOE has disagreed and responded to such challenges in past rulemakings.[20]

Even if the Department had definitive evidence regarding the extent of difficult or impossible installation situations, loss of usable residential or commercial space, or fuel switching effects, DOE nonetheless had a strong statutorily-based rationale for its historical interpretation and the return

[19] See Appendix 8J of the TSD for the September 2016 Furnace SNOPR (Available at: *www.regulations.gov* at Docket No. EERE–2014–BT–STD–0031–0217).

[20] For example, see the fuel switching analysis in the September 2016 Furnaces SNOPR. 81 FR 65720, 65792–65793 (Sept. 23, 2016).

thereto. As consumer utility turns on the layperson's operation and interaction with the product (*i.e.,* calling for and enjoying the heated air or water which the appliance in question provides) rather than type of combustion or venting, it follows that all furnaces and water heaters provide the same basic utility: Heated air or water.

As discussed previously, utility is not determined through analyzing or making comparisons to considerations that impact installation, or costs that anyone, including the consumer, manufacturer, installer, or utility companies, may bear. Utility is determined through the benefits and usefulness the feature provides to the consumer while interacting with the product. This approach is consistent with EPCA's requirement for a separate and extensive analysis of economic justification for the adoption of any new or amended energy conservation standard (*see* 42 U.S.C. 6295(o)(2)–(3); 42 U.S.C. 6313(a)(6)(A)–(C); 42 U.S.C. 6316(a)). Moreover, as discussed in the following section, DOE has concluded that this approach is more consistent with the overall purposes of EPCA.

C. Purposes of EPCA

In the August 2021 NOPIR, DOE tentatively concluded that it gave insufficient weight to other policy arguments in development of the January 2021 Final Interpretive Rule. 86 FR 48049, 48054 (August 27, 2021). In particular, DOE expressed concern that tying the concept of ''feature'' to a specific technology would effectively lock in the currently existing technology as the ceiling for product efficiency and eliminate DOE's ability to address technological advances that could yield significant consumer benefits in the form of lower energy costs while providing the same functionality/utility for the consumer. *Id.* (*citing* 81 FR 65720, 65752 (Sept. 23, 2016)). Because the statute effectively accords performance-related features a protected status, the Department must take great care when making a features determination.

On this topic, A.O. Smith commented that the January 2021 Final Interpretive Rule imposes an artificial ceiling on energy efficiency that is well below the maximum improvement that the Department would likely determine is technologically feasible if it followed its longstanding interpretation. The commenter also argued that the January 2021 Final Interpretive Rule would lock in an outdated and inefficient technology with no consumer benefit, an outcome contrary to EPCA. (A.O. Smith, No. 133 at p. 7) A.O. Smith added that the preservation of non-condensing water heaters at the current minimum efficiency level would freeze the marketplace, reduce innovation, increase regulatory burden, and limit consumer choice. (*Id.* at p. 8)

NEEA commented that establishing product classes based on non-condensing technology or venting type would limit innovation and increase the cost of efficiency for both consumers and utility programs. (NEEA, No. 137 at p. 3) NEEA further stated that maintaining a single product class for condensing and non-condensing equipment will: (1) Continue to encourage the market to develop lower-cost solutions for the small percentage of installations that are challenging; (2) reduce the cost of efficiency for consumers and utility programs, and (3) result in overall cost and energy savings as more condensing equipment is installed. (*Id.*)

CEC commented that finalizing the proposal from the August 2021 NOPIR will ensure that DOE is able to continue to address technological advances that could lower energy costs (something which is especially important to low-income consumers) and maintain product utility. (CEC, No. 134 at p. 2)

The State Attorneys General stated that the January 2021 Final Interpretive Rule unlawfully interpreted EPCA's statutory requirements and improperly constrained DOE's ability to adopt more stringent, updated efficiency standards for residential furnaces, commercial water heaters, and similarly-situated products and equipment. (State Attorneys General, No. 136 at p. 2) The State Attorneys General expressed concern that determining what constitutes a feature based solely on product technology, rather than how the consumer interacts with and benefits from a feature, could undermine the entire Appliance Standards Program, and they agreed that tying the concept of ''feature'' to a specific technology would effectively lock in the currently existing technology as the ceiling for product efficiency and eliminate DOE's ability to address technological advances that could yield significant consumer benefits in the form of lower energy costs while providing the same functionality/utility for the consumer. (*Id.* at p. 4)

The CA IOUs and ASAP *et al.* commented that designating a technology as a ''feature'' would hamper DOE's ability to increase standards in response to efficiency improvements, and that the proposed EPCA interpretation as presented in the August 2021 NOPIR better reflects EPCA's intent to increase standards as a means of ''promoting conservation measures when feasible.'' (CA IOUs, No. 141 at p. 2; ASAP *et al.,* No. 143 at p. 3)

In contrast, Bradford White disagreed with the contention that establishing non-condensing technology as a feature would limit technological innovation in the industry. The commenter pointed to condensing gas water heaters as an example, as that technology was nonetheless developed even though previous technologies were far more efficient than DOE and ENERGY STAR requirements. (Bradford White, No. 146 at p. 2)

AGA *et al.* commented that the proposed interpretation is based on a desired policy outcome that fails to adhere to structure Congress enacted into law, and that the proposal does not present a permissible interpretation of the statute. (AGA *et al.,* No. 135 at p. 23) These commenters asserted that the separation of the condensing and non-condensing product classes would allow DOE to focus on establishing the maximum feasible efficiency levels for each technology. (*Id.* at p. 19) AGA *et al.* also asserted that by separating condensing and non-condensing units, DOE could evaluate the cost of increased efficiency for condensing units without considering the increased costs required to retrofit millions of structures. (*Id.* at p. 20) AGA *et al.* stated that any effort to promulgate energy conservation standards based on the proposed interpretation would be contrary to EPCA and could not withstand judicial scrutiny. (*Id.*)

AHRI stated that separate product classes for condensing and non-condensing products/equipment would not deter technical development or slow the adoption of condensing technologies, but it would protect consumers who do not have the ability change the technology used in their building. (AHRI, No. 139 at p. 1) In support of its position that a separate product class would not hinder the movement in the market towards condensing products when feasible, AHRI also commented that existing market data demonstrate a trend towards condensing furnaces where venting does not present a technical problem. (*Id.* at p. 3)

GEUAG and APGA *et al.* asserted that utility and performance would be lessened under the interpretation proposed in the August 2021 NOPIR and disproportionately affect low-income consumers, which would be in contradiction with 42 U.S.C. 6295(o)(2)(B)(i). (GEUAG, No. 132 at p. 12; APGA *et al.,* No. 140 at p. 6)

IER stated that there is no explanation provided for the assertion made by DOE that the January 2021 Final Interpretive Rule would impede innovation and the development of more efficient technologies, and IER further stated that the market is moving toward more efficient appliances. (IER, No. 138 at p. 7) In addition, IER argued that Congress's purposes and goals in enacting EPCA were not that energy efficiency should overtake all competing concerns. (*Id.* at p. 8).

Crown Boiler, New Yorker Boiler, and U.S. Boiler reiterated their prior recommendations that DOE use ''compatibility with Category I venting'' as the feature that should be protected, stating that this approach would address the concern with potentially locking in a particular technology. (Crown Boiler, No. 127 at pp. 5–6; New Yorker Boiler, No. 130 at p. 6; U.S. Boiler, No. 129 at p. 6) Crown Boiler, New Yorker Boiler, and U.S. Boiler further commented that DOE's reliance on E.O. 13990 to initiate the review of the January 2021 Final Interpretive Rule suggests that DOE's reversal is rooted more in politics than in fault with the current rule. (Crown Boiler, No. 127 at p. 1; New Yorker Boiler, No. 130 at p. 1; U.S. Boiler, No. 129 at p. 1).

Similarly, APGA *et al.* commented that DOE cannot rely solely on the terms of E.O. 13990 as its justification for changing its position, and that DOE must follow the statute and not render ''policy choices for purely political reasons nor to rest them primarily upon unexplained policy preferences.'' (APGA *et al.,* No. 140 at p. 5).

Additionally, GEUAG stated that nothing has changed in the applicable legal standards and requirements that govern such determinations and asserted that DOE's decision is a result of changing policy preferences. The commenter stated that DOE cited E.O. 13990 as part of its rationale to justify its change in position, but argued that such executive actions cannot supersede existing statutes, such as EPCA, that protect consumers from regulatory overreach. (GEUAG, No. 132 at p. 8).

APGA *et al.* and GEUAG asserted that promotion of electrification is not an authorized objective under EPCA, and that the proposed interpretation would expand DOE's authority beyond that authorized by Congress. (APGA *et al.,* No. 140 at pp. 2, 5. 6, 7, 11; GEUAG, No. 132 at p. 5) GEUAG asserted that the proposed interpretation in the August 2021 NOPIR would arbitrarily and unnecessarily erode the important role played by natural gas and propane in favor of energy sources that have significant and negative environmental and human rights issues, or require technologies that cannot meet demands currently served by natural gas and propane. GEAUAG also stated that the reliance on such alternative energy sources will put the United States in competition for rare earth minerals against those with policies in conflict with the best interests of Americans. (GEUAG, No. 132 at p. 3) (DOE understands this comment to be referencing the use of rare earth minerals in certain technologies that are commonly associated with electrification, such as batteries.) APGA *et al.* further commented that EPCA's purpose to conserve energy must be considered in terms of the product being regulated (gas products), not savings incurred by switching to a different product class (electric products). (APGA *et al.,* No. 140 at p. 11).

As stated previously, DOE initiated a re-review of the January 2020 Final Interpretative Rule in response to E.O 13990. However, the final interpretation, which reinstates DOE's historical interpretation, is based solely on EPCA, review of public comments received, and the analysis presented in this document. Contrary to assertions from certain commenters, it is not based on political considerations or a policy to promote electrification. Instead, as explained in detail previously, it is based on what the Department has concluded to be the better reading of the ''features'' provision in light of EPCA's direction for DOE to establish new and amended energy conservation standards for covered products and equipment to achieve the congressional purpose of improving the energy efficiency of major appliances and certain other consumer products. (42 U.S.C. 6201(5)) It is further noted that EPCA directs DOE to regulate enumerated types of covered products and equipment, not specific subcategories of equipment tied to the technologies they utilize. Not surprisingly, different groups of commenters on the August 2021 NOPIR had diametrically opposed viewpoints as to the lawful interpretation of the relevant statutory provisions.

In the 2016 Furnaces SNOPR, DOE expressed concern that separate standards based on preserving a technology used to produce heated air (or the associated type of venting) would not place any restriction on the use of non-condensing appliances and, therefore, would not be a meaningful standard, resulting in little or no change in products offered, their market shares, or energy savings. *See* 81 FR 65720, 65752–65753 (Sept. 23, 2016). DOE remains concerned that determining features solely on product technology, rather than on how the consumer interacts with and benefits from the feature, could undermine the Appliance Standards Program established by EPCA.

As previously discussed and identified by commenters, newer technologies are being developed and introduced into the market that, when mature could address issues of difficult installation (orphaned appliances in particular), thereby allowing consumers to switch from a non-condensing furnace to a condensing furnace while permitting continued use of existing common venting in a greater variety of applications. This venting technology may allow a consumer to obtain the efficiency of a condensing furnace using the existing venting in a residence by sharing venting space with a water heater. However, DOE also notes that such technology was not incorporated into the analysis conducted for the prior rulemakings and would include such technology in its analysis only after evaluating the technological feasibility of any such technology in future rulemakings.

In response to Crown Boiler, New Yorker Boiler, and U.S. Boiler's suggestions to rely on venting capability as the ''feature,'' DOE previously determined that such an approach would increase the complexity and regulatory burden of its regulatory framework (*e.g.,* the certification of appliances capable of operating with multiple categories of venting) with little benefit. 86 FR 4776, 4972. (Jan. 15, 2021) Additionally, DOE notes that much of the same reasoning for rejecting an interpretation of the ''features'' provision to cover non-condensing technology would apply. Venting compatibility is not an aspect of the product that is accessible to the layperson and is based on user operation and interaction with the product. The issues sought to be addressed by these commenters' recommendation are issues of cost related to installation and would result in preserving less-efficient technologies.

If DOE is required to maintain separate product classes to preserve less-efficient technologies (*i.e.,* if non-condensing products remain available), the development and advancement of such technologies may be slowed, if not stalled. As efficiencies are increased for non-condensing appliances to near-condensing efficiency levels (*i.e.,* higher efficiencies), small amounts of acidic condensate would form that would require upgrades similar to what is required for condensing systems. Thus, were the product and equipment classes tied to non-condensing technology,

DOE's ability to increase efficiencies would be limited, if not forestalled entirely. Further, if separate product classes are maintained to preserve less-efficient technologies, then future advancements in the energy efficiency of covered products would become largely voluntary, an outcome in conflict with Congress's purposes and goals in enacting EPCA.

Moreover, EPCA provides for consideration of the costs associated with difficult installations and the potential impact on consumers, including sub-groups of consumers, as part of the robust economic factors DOE is statutorily required to consider. As discussed, such installation costs are appropriately considered when comparing the savings in operating costs to any increase in the price of, or in the initial charges for, a covered product or article of covered equipment which are likely to result from the imposition of standards, as directed by EPCA. (42 U.S.C. 6295(o)(2)(B)(i)(II)) It is noted that EPCA requires DOE to consider whether its overall energy conservation standards are economically justified, not to assess economic justification in each individual instance, which is tantamount to what certain commenters would ask the agency to do.

In response to comments about market trends moving towards condensing appliances, DOE takes into consideration such trends as part of the national impact analysis conducted to determine whether amended standards are justified under EPCA's economic factors. As explained in the withdrawn March 2015 Furnaces NOPR and September 2016 Furnaces SNOPR for residential furnaces, a key component of the national impact analysis is the trend in energy efficiency projected for the no-new-standards case and each of the evaluated standards cases. 81 FR 65720, 65796 (Sept. 23, 2016). In the withdrawn September 2016 Furnaces SNOPR, DOE projected growth in the national market share of condensing products in the base case analysis (*i.e.,* a scenario in which the current standards are not amended). *Id.*[21] The ''features'' provision directs DOE to consider the availability of products with certain attributes following the establishment of new or amended energy conservation standards. The consideration of market trends is appropriately addressed as part of the economic evaluation to estimate the costs and energy savings at a national level consistent with 42 U.S.C. 6295(o)(2)(B)(i)(II) and 42 U.S.C. 6313(a)(6)(B)(ii)(II), not as part of the ''features'' consideration.

Moreover, simply relying on the market to realize improvements in energy efficiency and related technological innovations would result in the Appliance Standards Program being largely voluntary, contrary to the purposes and goals of EPCA. The regulatory scheme prescribed by EPCA directs DOE to drive efficiencies beyond what the market provides where energy conservation would result in significant energy savings and are technologically feasible and economically justified. *See generally* 42 U.S.C. 6295(o); 42 U.S.C. 6313(a)(6)(A)–(C); 42 U.S.C. 6316(a).

Based on the foregoing discussion, DOE revises its interpretation of EPCA's ''features'' provision in the context of condensing and non-condensing technology used in furnaces, water heating equipment, and similarly-situated appliances (where permitted by EPCA) along the lines discussed. Accordingly, DOE concludes that in the context of residential furnaces, commercial water heaters, and similarly-situated products/equipment, use of non-condensing technology (and associated venting) is not a performance-related ''feature'' for the purpose of the EPCA prohibitions at 42 U.S.C. 6295(o)(4) and 42 U.S.C. 6313(a)(6)(B)(iii)(II)(aa).

D. Other Topics

In the August 2021 NOPIR, DOE stated that at the conclusion of this proceeding, the Department plans to again evaluate whether amended energy conservation standards would result in significant savings of energy, be technologically feasible, and be economically justified, consistent with its latest interpretation. 86 FR 48049, 48057 (August 27, 2021).

Regarding the petition-for-rulemaking process, the CA IOUs commented that DOE should produce explicit guidelines on what types and what quantity of evidence is necessary to be considered as a petition to change DOE policies and processes for DOE rulemakings, in order to avoid wasted time and funds. (CA IOUs, No. 141 at p. 2).

A.O. Smith commented that the January 2021 reinterpretation disadvantages U.S.-based manufacturers against low-cost and subsidized products imported from outside the United States. (A.O. Smith, No. 133 at p. 8) A.O. Smith also expressed concern that the January 2021 Final Interpretative Rule, if relied upon to set Federal efficiency standards, will invite many State petitions for exemption from Federal preemption in order to allow for stricter State regulations, given the low Federal standards that would be adopted. (*Id.*).

GEUAG provided a number of criticisms of the economic analysis performed by DOE as part of past rulemakings to evaluate amended energy conservation standards. (GEUAG, No. 132 at pp. 9, 11) GEUAG also provided a number of comments regarding the economic analyses conducted as part of the withdrawn rulemaking notices, including comments on the assumptions relied on in the Monte Carlo analyses conducted as part of the national impact analysis, which GEUAG asserted inflated the estimated energy savings. (*Id.* at p. 9) Similarly, APGA *et al.* asserted that a condensing standard for gas products is not economically justified and questioned a number of aspects of the economic analyses conducted as part of the prior standards rulemakings. (APGA *et al.,* No. 140 at pp. 12–15).

AGA *et al.* encouraged DOE to adopt minimum efficiency standards and related policies only after consideration of all relevant points of view, including the distributors of natural gas, whose desire for the efficient use of natural gas is matched only by their commitment to ensure minimum standards do not distort consumers choices away from natural gas to potentially more costly fuel sources. (AGA *et al.,* No. 135 at p. 3).

Other commenters urged DOE to finalize the August 2021 NOPIR and proceed with rulemakings to set new energy efficiency standards expeditiously. The CA IOUs commented that DOE should not restart rulemakings for residential furnaces and commercial water heaters from scratch, because the previous analyses are still relevant, and new standards should be established. (CA IOUs, No. 141 at p. 3) The State Attorneys General and ASAP *et al.* urged DOE to finalize its proposed interpretive rule and proceed expeditiously towards updating efficiency standards for residential furnaces and commercial hot water heaters. (State Attorneys General, No. 136 at p. 4; ASAP *et al.,* No. 143 at p. 3) NEEA recommended that DOE finalize the August 2021 proposed interpretive rule as soon as possible and proceed expeditiously with the rulemakings for non-weatherized gas furnaces and commercial water heating equipment, which have the potential to result in significant energy savings. (NEEA, No. 137 at pp. 3–4) CEC likewise urged DOE to finalize the proposed interpretation as soon as possible and to consider energy savings,

[21] *See also* Chapter 10 of the TSD to the September 2016 Furnaces SNOPR (Available at: *www.regulations.gov* at Docket No. EERE–2014–BT–STD–0031–0217).

economic justification, and emissions reductions with greater weight than the potential for fuel switching in all ongoing and upcoming rulemakings, unless otherwise explicitly directed by Congress. (CEC, No. 134 at pp. 3, 4) ASAP *et al.* commented that setting condensing standards have the potential to save U.S. consumers and businesses more than $100 billion on their energy bills through 2050 while reducing cumulative carbon dioxide emissions by more than 500 million metric tons. (ASAP *et al.,* No 143 at p. 1).

As discussed previously, given the multitude of covered products and equipment for which DOE is responsible, the Department has found the concept of ''feature'' to be very case-specific. 86 FR 4776, 4797 (Jan. 15, 2021). As such, DOE finds that it would not be practicable, as suggested by the CA IOUs, to develop guidelines as to the type and degree of the information and data necessary to make a determination under the ''features'' provision.

With regard to rulemakings for residential furnaces and commercial water heaters, as noted, DOE withdrew its March 12, 2015 proposed rule and September 23, 2016 supplemental proposed rule for energy conservation standards for non-weatherized gas furnace and mobile home gas furnaces, as well as its May 31, 2016 proposed rule for energy conservation standards for commercial water heating equipment, for further proceedings consistent with the interpretation contained in the January 2021 Final Interpretive Rule. 86 FR 4776, 4817 (Jan. 15, 2021); *see also* 86 FR 3873 (Jan. 15, 2021).

As explained in this document, after a careful review of the available information and public comments received, DOE is adopting the interpretation as proposed in the August 2021 NOPIR, which reinstates its historical interpretation of the ''features'' provision. This change in approach should address any competition concerns or preemption waiver issues mentioned by A.O. Smith. With the finalization of this interpretation, DOE plans to once again evaluate whether amended energy conservation standards for the subject covered products/equipment would result in significant savings of energy, be technologically feasible, and be economically justified, consistent with its latest interpretation. As always, DOE welcomes public comments from all interested parties and will take into account the viewpoints expressed in this proceeding. As part of that evaluation, DOE will consider the comments addressing the technical and economic analyses, as well as any associated assumptions.

As explained in the August 2021 NOPR, in any future rulemaking, DOE will make clear that the rulemakings for residential furnaces and commercial water heating equipment have been subject to multiple rounds of public comment, including public meetings, and extensive records have been developed in the relevant dockets. (*See* Docket Number EERE–2014–BT–STD–0031 and Docket Number EERE–2014–BT–STD–0042, respectively). Consequently, DOE wishes to reassure stakeholders that the information obtained through those earlier rounds of public comment, information exchange, and data gathering have not gone to waste. Instead, DOE anticipates building upon these existing records through further notice and comment rulemaking. Such an approach also reflects DOE's cognizance of the statutory deadlines associated with the energy conservation standards for residential furnaces and commercial water heating equipment. Further, any future rulemakings would evaluate potential energy conservation standards according to the requirements of EPCA and consistent with this document. Comments pertaining to the details of DOE's economic analyses will be addressed, as appropriate, in those individual energy conservation standards rulemakings.

III. Conclusion

In summary, for this final interpretive rule, DOE has concluded that differences in cost or complexity of installation between different methods of venting (*e.g.,* a condensing residential furnace versus a non-condensing residential furnace; a condensing commercial water heater versus a non-condensing commercial water heater) do not make any method of venting a performance-feature under 42 U.S.C. 6295(o)(4) (or 42 U.S.C. 6313(a)(6)(B)(iii)(II)(aa); 42 U.S.C. 6316(a) for certain covered equipment). Relatedly, DOE has concluded that the possibility that installing an appliance that employs a particular method of venting (*e.g.,* a non-condensing residential furnace, a non-condensing commercial water heater) may be less costly or less complex than installing a product that employs a different method of venting (*e.g.,* a condensing furnace; a condensing commercial water heater) does not justify separating the products/equipment into different product/equipment classes under 42 U.S.C. 6295(q)(1) (or as applicable to certain covered equipment under 42 U.S.C. 6316(a)).

Based on the foregoing discussion and careful consideration of available information and comments received, DOE hereby revises its interpretation of EPCA's ''features'' provision in the context of condensing and non-condensing technology used in furnaces, water heating equipment, and similarly-situated appliances (where permitted by EPCA) along the lines discussed previously elsewhere in this document. DOE concludes that in the context of residential furnaces, commercial water heaters, and similarly-situated products/equipment, use of non-condensing technology (and associated venting) is not a performance-related ''feature'' for the purpose of the EPCA prohibitions at 42 U.S.C. 6295(o)(4); 42 U.S.C. 6313(a)(6)(B)(iii)(II)(aa); 42 U.S.C. 6316(a).

DOE has determined that its interpretation is the better reading of the relevant language of EPCA and DOE's statutory obligation to establish energy conservation standards for covered products and equipment. Additionally, the interpretation allows DOE to consider more-efficient standards for certain products and equipment, consistent with the agency's statutory mandate.

DOE is revising its application of the ''features'' provisions in 42 U.S.C. 6295(o)(4) and 42 U.S.C. 6313(a)(6)(B)(iii)(II)(aa) as an interpretive rule within the meaning of the Administrative Procedure Act (APA). 5 U.S.C. 551(4), 5 U.S.C. 553(b). DOE published the proposed interpretive rule in the **Federal Register** (86 FR 48049 (August 27, 2021)) to solicit comment and to provide the public with a clear and transparent explanation of DOE's view of a specific legal question, thereby following a process similar to that which resulted in the January 2021 Final Interpretive Rule.

Review Under Executive Order 12866

The Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) waived review of this interpretive rule under Executive Order 12866, ''Regulatory Planning and Review.'' 58 FR 51735 (Oct. 4, 1993).

IV. Approval of the Office of the Secretary

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

Signing Authority

This document of the Department of Energy was signed on December 20,

2021, by Kelly J. Speakes-Backman, Principal Deputy Assistant Secretary for Energy Efficiency and Renewable 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 December 21, 2021.

Treena V. Garrett,

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

[FR Doc. 2021–28007 Filed 12–28–21; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 73

[Docket No. FDA–2018–C–4117]

Listing of Color Additives Exempt From Certification; Butterfly Pea Flower Extract; Confirmation of Effective Date

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; confirmation of effective date.

SUMMARY: The Food and Drug Administration (FDA or we) is confirming the effective date of October 5, 2021, for the final rule that appeared in the **Federal Register** of September 2, 2021, and that amended the color additive regulations to provide for the safe use of butterfly pea flower extract in various food categories at levels consistent with good manufacturing practice.

DATES: Effective date of final rule published in the **Federal Register** of September 2, 2021 (86 FR 49230) confirmed: October 5, 2021.

ADDRESSES: For access to the docket to read background documents or comments received, go to *https://www.regulations.gov* and insert the docket number found in brackets in the heading of this final rule into the ''Search'' box and follow the prompts, and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Stephen DiFranco, Center for Food Safety and Applied Nutrition, Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740, 240–402–2710.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of September 2, 2021 (86 FR 49230), we amended the color additive regulations in 21 CFR part 73 Color Additives Exempt From Certification by adding 21 CFR 73.69 to provide for the safe use of butterfly pea flower extract as a color additive in various food categories at levels consistent with good manufacturing practice.

We gave interested persons until October 4, 2021, to file objections or requests for a hearing. We received no objections or requests for a hearing on the final rule. Therefore, we find that the effective date of the final rule that published in the **Federal Register** of September 2, 2021, should be confirmed.

List of Subjects in 21 CFR Part 73

Color additives, Cosmetics, Drugs, Foods, Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 341, 342, 343, 348, 351, 352, 355, 361, 362, 371, 379e) and under authority delegated to the Commissioner of Food and Drugs, we are giving notice that no objections or requests for a hearing were filed in response to the September 2, 2021, final rule. Accordingly, the amendments issued thereby became effective October 5, 2021.

Dated: December 21, 2021.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2021–28159 Filed 12–28–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 73

[Docket No. FDA–2018–C–0617]

Listing of Color Additives Exempt From Certification; Silver Nitrate; Confirmation of Effective Date

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; confirmation of effective date.

SUMMARY: The Food and Drug Administration (FDA or we) is confirming the effective date of November 8, 2021, for the final rule that appeared in the **Federal Register** of October 6, 2021, and that amended the color additive regulations to provide for the safe use of silver nitrate as a color additive in professional-use only cosmetics to color eyebrows and eyelashes.

DATES: Effective date of final rule published in the **Federal Register** of October 6, 2021 (86 FR 55494) confirmed: November 8, 2021.

ADDRESSES: For access to the docket to read background documents or comments received, go to *https://www.regulations.gov* and insert the docket number found in brackets in the heading of this final rule into the ''Search'' box and follow the prompts, and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Rachel Morissette, Center for Food Safety and Applied Nutrition, Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740, 240–402–1212.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of October 6, 2021 (86 FR 55494), we amended the color additive regulations in § 73.2550 (21 CFR 73.2550), ''Silver nitrate,'' to provide for the safe use of silver nitrate as a color additive in professional-use only cosmetics to color eyebrows and eyelashes.

We gave interested persons until November 5, 2021, to file objections or requests for a hearing. We received no objections or requests for a hearing on the final rule. Therefore, we find that the effective date of the final rule that published in the **Federal Register** of October 6, 2021, should be confirmed.

List of Subjects in 21 CFR Part 73

Color additives, Cosmetics, Drugs, Foods, Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 341, 342, 343, 348, 351, 352, 355, 361, 362, 371, 379e) and under authority delegated to the Commissioner of Food and Drugs, we are giving notice that no objections or requests for a hearing were filed in response to the October 6, 2021, final rule. Accordingly, the amendments issued thereby became effective November 8, 2021.

Dated: December 21, 2021.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2021–28158 Filed 12–28–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 876

[Docket No. FDA–2021–N–0858]

Medical Devices; Gastroenterology-Urology Devices; Classification of the Transcutaneous Electrical Continence Device

AGENCY: Food and Drug Administration, HHS.

ACTION: Final amendment; final order.

SUMMARY: The Food and Drug Administration (FDA or we) is classifying the transcutaneous electrical continence device into class II (special controls). The special controls that apply to the device type are identified in this order and will be part of the codified language for the transcutaneous electrical continence device's classification. We are taking this action because we have determined that classifying the device into class II (special controls) will provide a reasonable assurance of safety and effectiveness of the device. We believe this action will also enhance patients' access to beneficial innovative devices.

DATES: This order is effective December 29, 2021. The classification was applicable on November 6, 2018.

FOR FURTHER INFORMATION CONTACT: Purva Pandya, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 4634, Silver Spring, MD 20993–0002, 240–402–9979, *Purva.Pandya@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Upon request, FDA has classified the transcutaneous electrical continence device as class II (special controls), which we have determined will provide a reasonable assurance of safety and effectiveness. In addition, we believe this action will enhance patients' access to beneficial innovation, by placing the device into a lower device class than the automatic class III assignment.

The automatic assignment of class III occurs by operation of law and without any action by FDA, regardless of the level of risk posed by the new device. Any device that was not in commercial distribution before May 28, 1976, is automatically classified as, and remains within, class III and requires premarket approval unless and until FDA takes an action to classify or reclassify the device (see 21 U.S.C. 360c(f)(1)). We refer to these devices as ''postamendments devices'' because they were not in commercial distribution prior to the date of enactment of the Medical Device Amendments of 1976, which amended the Federal Food, Drug, and Cosmetic Act (FD&C Act).

FDA may take a variety of actions in appropriate circumstances to classify or reclassify a device into class I or II. We may issue an order finding a new device to be substantially equivalent under section 513(i) of the FD&C Act (see 21 U.S.C. 360c(i)) to a predicate device that does not require premarket approval. We determine whether a new device is substantially equivalent to a predicate device by means of the procedures for premarket notification under section 510(k) of the FD&C Act (21 U.S.C. 360(k)) and part 807 (21 CFR part 807).

FDA may also classify a device through ''De Novo'' classification, a common name for the process authorized under section 513(f)(2) of the FD&C Act. Section 207 of the Food and Drug Administration Modernization Act of 1997 established the first procedure for De Novo classification (Pub. L. 105–115). Section 607 of the Food and Drug Administration Safety and Innovation Act modified the De Novo application process by adding a second procedure (Pub. L. 112–144). A device sponsor may utilize either procedure for De Novo classification.

Under the first procedure, the person submits a 510(k) for a device that has not previously been classified. After receiving an order from FDA classifying the device into class III under section 513(f)(1) of the FD&C Act, the person then requests a classification under section 513(f)(2).

Under the second procedure, rather than first submitting a 510(k) and then a request for classification, if the person determines that there is no legally marketed device upon which to base a determination of substantial equivalence, that person requests a classification under section 513(f)(2) of the FD&C Act.

Under either procedure for De Novo classification, FDA is required to classify the device by written order within 120 days. The classification will be according to the criteria under section 513(a)(1) of the FD&C Act. Although the device was automatically placed within class III, the De Novo classification is considered to be the initial classification of the device.

When FDA classifies a device into class I or II via the De Novo process, the device can serve as a predicate for future devices of that type, including for 510(k)s (see 21 U.S.C. 360c(f)(2)(B)(i)). As a result, other device sponsors do not have to submit a De Novo request or premarket approval application to market a substantially equivalent device (see 21 U.S.C. 360c(i), defining ''substantial equivalence''). Instead, sponsors can use the less-burdensome 510(k) process, when necessary, to market their device.

II. De Novo Classification

On September 18, 2017, FDA received Bio-Medical Research Ltd.'s request for De Novo classification of the INNOVO. FDA reviewed the request in order to classify the device under the criteria for classification set forth in section 513(a)(1) of the FD&C Act.

We classify devices into class II if general controls by themselves are insufficient to provide reasonable assurance of safety and effectiveness, but there is sufficient information to establish special controls that, in combination with the general controls, provide reasonable assurance of the safety and effectiveness of the device for its intended use (see 21 U.S.C. 360c(a)(1)(B)). After review of the information submitted in the request, we determined that the device can be classified into class II with the establishment of special controls. FDA has determined that these special controls, in addition to the general controls, will provide reasonable assurance of the safety and effectiveness of the device.

Therefore, on November 6, 2018, FDA issued an order to the requester classifying the device into class II. In this final order, FDA is codifying the classification of the device by adding 21 CFR 876.5330.[1] We have named the generic type of device transcutaneous electrical continence device, and it is identified as a device that consists of cutaneous electrodes that are used to apply external stimulation to reduce urinary incontinence.

FDA has identified the following risks to health associated specifically with this type of device and the measures required to mitigate these risks in table 1.

[1] FDA notes that the ACTION caption for this final order is styled as ''Final amendment; final order,'' rather than ''Final order.'' Beginning in December 2019, this editorial change was made to indicate that the document ''amends'' the Code of Federal Regulations. The change was made in accordance with the Office of Federal Register's (OFR) interpretations of the Federal Register Act (44 U.S.C. chapter 15), its implementing regulations (1 CFR 5.9 and parts 21 and 22), and the Document Drafting Handbook.

TABLE 1—TRANSCUTANEOUS ELECTRICAL CONTINENCE DEVICE RISKS AND MITIGATION MEASURES

Identified risks	Mitigation measures
Pain or tissue damage due to overstimulation	Non-clinical performance testing; Software verification, validation, and hazard analysis; Electrical safety testing; and Labeling.
Adverse tissue reaction	Biocompatibility evaluation.
Electrical shock or burn	Electrical safety testing; Software verification, validation, and hazard analysis; and Labeling.
Device failure due to electromagnetic interference	Electromagnetic compatibility (EMC) testing; software verification, validation, and hazard analysis; and Labeling.
Use error that may result in user discomfort, injury, or delay in treatment.	Software verification, validation, and hazard analysis; and Labeling.

FDA has determined that special controls, in combination with the general controls, address these risks to health and provide reasonable assurance of safety and effectiveness. In order for a device to fall within this classification, and thus avoid automatic classification in class III, it would have to comply with the special controls named in this final order. The necessary special controls appear in the regulation codified by this order. This device is subject to premarket notification requirements under section 510(k) of the FD&C Act.

III. Analysis of Environmental Impact

The Agency has determined under 21 CFR 25.34(b) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

IV. Paperwork Reduction Act of 1995

This final order establishes special controls that refer to previously approved collections of information found in other FDA regulations and guidance. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521). The collections of information in the guidance document ''De Novo Classification Process (Evaluation of Automatic Class III Designation)'' have been approved under OMB control number 0910–0844; the collections of information in 21 CFR part 814, subparts A through E, regarding premarket approval, have been approved under OMB control number 0910–0231; the collections of information in part 807, subpart E, regarding premarket notification submissions, have been approved under OMB control number 0910–0120; the collections of information in 21 CFR part 820, regarding quality system regulation, have been approved under OMB control number 0910–0073; and the collections of information in 21 CFR part 801, regarding labeling, have been approved under OMB control number 0910–0485.

List of Subjects in 21 CFR Part 876

Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 876 is amended as follows:

PART 876—GASTROENTEROLOGY-UROLOGY DEVICES

■ 1. The authority citation for part 876 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 360l, 371.

■ Add § a876.5330 to subpart F to read as follows:

§ 876.5330 Transcutaneous electrical continence device.

(a) *Identification.* A transcutaneous electrical continence device consists of cutaneous electrodes that are used to apply external stimulation to reduce urinary incontinence.

(b) *Classification.* Class II (special controls). The special controls for this device are:

(1) Non-clinical performance testing must characterize the electrical stimulation, including the following: Waveforms, output modes, maximum output voltage, maximum output current, pulse duration, frequency, net charge per pulse, maximum phase charge at 500 ohms, maximum current density, maximum average current, and maximum average power density.

(2) The patient-contacting materials must be demonstrated to be biocompatible.

(3) Performance data must demonstrate the electromagnetic compatibility (EMC), electrical safety, thermal safety, and mechanical safety of the device.

(4) Software verification, validation, and hazard analysis must be performed.

(5) Labeling must include the following:

(i) Instructions for use, including specific instructions regarding the proper placement of electrodes;

(ii) A summary of electrical stimulation parameters; and

(iii) Cleaning instructions and reuse information.

Dated: December 16, 2021.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2021–28163 Filed 12–28–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 882

[Docket No. FDA–2021–N–0573]

Medical Devices; Neurological Devices; Classification of the Diagnostic Neurosurgical Microscope Filter

AGENCY: Food and Drug Administration, HHS.

ACTION: Final amendment; final order.

SUMMARY: The Food and Drug Administration (FDA or we) is classifying the diagnostic neurosurgical microscope filter into class II (special controls). The special controls that apply to the device type are identified in this order and will be part of the codified language for the diagnostic neurosurgical microscope filter's classification. We are taking this action because we have determined that classifying the device into class II (special controls) will provide a reasonable assurance of safety and effectiveness of the device. We believe this action will also enhance patients' access to beneficial innovative devices.

DATES: This order is effective December 29, 2021. The classification was applicable on March 28, 2019.

FOR FURTHER INFORMATION CONTACT: Daryl Kaufman, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 4212, Silver Spring, MD 20993–0002, 301–796–6467, *Daryl.Kaufman@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Upon request, FDA has classified the diagnostic neurosurgical microscope filter as class II (special controls), which we have determined will provide a reasonable assurance of safety and effectiveness. In addition, we believe this action will enhance patients' access to beneficial innovation by placing the device into a lower device class than the automatic class III assignment.

The automatic assignment of class III occurs by operation of law and without any action by FDA, regardless of the level of risk posed by the new device. Any device that was not in commercial distribution before May 28, 1976, is automatically classified as, and remains within, class III and requires premarket approval unless and until FDA takes an action to classify or reclassify the device (see 21 U.S.C. 360c(f)(1)). We refer to these devices as ''postamendments devices'' because they were not in commercial distribution prior to the date of enactment of the Medical Device Amendments of 1976, which amended the Federal Food, Drug, and Cosmetic Act (FD&C Act).

FDA may take a variety of actions in appropriate circumstances to classify or reclassify a device into class I or II. We may issue an order finding a new device to be substantially equivalent under section 513(i) of the FD&C Act (21 U.S.C. 360c(i)) to a predicate device that does not require premarket approval. We determine whether a new device is substantially equivalent to a predicate by means of the procedures for premarket notification under section 510(k) of the FD&C Act (21 U.S.C. 360(k)) and part 807 (21 CFR part 807).

FDA may also classify a device through ''De Novo'' classification, a common name for the process authorized under section 513(f)(2) of the FD&C Act. Section 207 of the Food and Drug Administration Modernization Act of 1997 established the first procedure for De Novo classification (Pub. L. 105–115). Section 607 of the Food and Drug Administration Safety and Innovation Act modified the De Novo application process by adding a second procedure (Pub. L. 112–144). A device sponsor may utilize either procedure for De Novo classification.

Under the first procedure, the person submits a 510(k) for a device that has not previously been classified. After receiving an order from FDA classifying the device into class III under section 513(f)(1) of the FD&C Act, the person then requests a classification under section 513(f)(2).

Under the second procedure, rather than first submitting a 510(k) and then a request for classification, if the person determines that there is no legally marketed device upon which to base a determination of substantial equivalence, that person requests a classification under section 513(f)(2) of the FD&C Act.

Under either procedure for De Novo classification, FDA is required to classify the device by written order within 120 days. The classification will be according to the criteria under section 513(a)(1) of the FD&C Act. Although the device was automatically within class III, the De Novo classification is considered to be the initial classification of the device.

We believe this De Novo classification will enhance patients' access to beneficial innovation. When FDA classifies a device into class I or II via the De Novo process, the device can serve as a predicate for future devices of that type, including for 510(k)s (see 21 U.S.C. 360c(f)(2)(B)(i)). As a result, other device sponsors do not have to submit a De Novo request or premarket approval application to market a substantially equivalent device (see 21 U.S.C. 360c(i), defining ''substantial equivalence''). Instead, sponsors can use the less-burdensome 510(k) process, when necessary, to market their device.

II. De Novo Classification

On April 27, 2018, Leica Microsystems AG submitted a request for De Novo classification of the Leica FL400. FDA reviewed the request in order to classify the device under the criteria for classification set forth in section 513(a)(1) of the FD&C Act.

We classify devices into class II if general controls by themselves are insufficient to provide reasonable assurance of safety and effectiveness, but there is sufficient information to establish special controls that, in combination with the general controls, provide reasonable assurance of the safety and effectiveness of the device for its intended use (see 21 U.S.C. 360c(a)(1)(B)). After review of the information submitted in the request, we determined that the device can be classified into class II with the establishment of special controls. FDA has determined that these special controls, in addition to the general controls, will provide reasonable assurance of the safety and effectiveness of the device.

Therefore, on March 28, 2019, FDA issued an order to the requester classifying the device into class II. In this final order, FDA is codifying the classification of the device by adding 21 CFR 882.4950.[1] We have named the generic type of device diagnostic neurosurgical microscope filter, and it is identified as a device intended for use during neurosurgery to visualize fluorescence and enhance visualization of tissue associated with a specific disease or condition.

FDA has identified the following risks to health associated specifically with this type of device and the measures required to mitigate these risks in table 1.

TABLE 1—DIAGNOSTIC NEUROSURGICAL MICROSCOPE FILTER RISKS AND MITIGATION MEASURES

Identified risks	Mitigation measures
Incorrect or misinterpreted results, including: • False positive: Visualization of fluorescence when in fact no target fluorophore is present. • False negative: No visualization of fluorescence when in fact the target fluorophore is present.	Non-clinical performance testing, and Labeling.

[1] FDA notes that the ACTION caption for this final order is styled as ''Final amendment; final order,'' rather than ''Final order.'' Beginning in December 2019, this editorial change was made to indicate that the document ''amends'' the Code of Federal Regulations. The change was made in accordance with the Office of Federal Register's (OFR) interpretations of the Federal Register Act (44 U.S.C. chapter 15), its implementing regulations (1 CFR 5.9 and parts 21 and 22), and the Document Drafting Handbook.

FDA has determined that special controls, in combination with the general controls, address these risks to health and provide reasonable assurance of safety and effectiveness. In order for a device to fall within this classification, and thus avoid automatic classification in class III, it would have to comply with the special controls named in this final order. The necessary special controls appear in the regulation codified by this order. This device is subject to premarket notification requirements under section 510(k).

At the time of classification, diagnostic neurosurgical microscope filters are for prescription use only. Prescription devices are exempt from the requirement for adequate directions for use for the layperson under section 502(f)(1) of the FD&C Act (21 U.S.C. 352(f)(1)) and 21 CFR 801.5, as long as the conditions of 21 CFR 801.109 are met.

III. Analysis of Environmental Impact

The Agency has determined under 21 CFR 25.34(b) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

IV. Paperwork Reduction Act of 1995

This final order establishes special controls that refer to previously approved collections of information found in other FDA regulations and guidance. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521). The collections of information in the guidance document ''De Novo Classification Process (Evaluation of Automatic Class III Designation)'' have been approved under OMB control number 0910–0844; the collections of information in 21 CFR part 814, subparts A through E, regarding premarket approval, have been approved under OMB control number 0910–0231; the collections of information in part 807, subpart E, regarding premarket notification submissions, have been approved under OMB control number 0910–0120; the collections of information in 21 CFR part 820, regarding quality system regulation, have been approved under OMB control number 0910–0073; and the collections of information in 21 CFR part 801, regarding labeling, have been approved under OMB control number 0910–0485.

List of Subjects in 21 CFR Part 882

Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act, and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 882 is amended as follows:

PART 882—NEUROLOGICAL DEVICES

■ 1. The authority citation for part 882 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 360l, 371.

■ 2. Add § 882.4950 to subpart E to read as follows:

§ 882.4950 Diagnostic neurosurgical microscope filter.

(a) *Identification.* A diagnostic neurosurgical microscope filter is a device intended for use during neurosurgery to visualize fluorescence and enhance visualization of tissue associated with a specific disease or condition.

(b) *Classification.* Class II (special controls). The special controls for this device are:

(1) Non-clinical performance testing must demonstrate that the device performs as intended under anticipated conditions of use, and verify and validate filter specifications and functional characteristics, including the following:

(i) Spectrum and intensity of the illumination source;

(ii) Spectrum of the excitation and emission filter modules when integrated in the surgical operating microscope;

(iii) Excitation power and power density;

(iv) Optical path loss from illumination source to objective lens or microscope camera;

(v) Homogeneity of the excitation light at the focal plane;

(vi) Fluorescence detection sensitivity;

(vii) Verification of calibration or preoperative procedures; and

(viii) If camera-based, spectral sensitivity of the camera.

(2) Labeling must include:

(i) Identification of the filter characteristics in conjunction with a compatible surgical operating microscope, to include the following:

(A) Illumination spectrum and power density; and

(B) Excitation and emission filter spectra.

(ii) Instructions for calibration or preoperative checks to ensure device functionality prior to each use;

(iii) Instructions for use with compatible surgical operating microscopes, external light sources, and cameras;

(iv) A warning that the device should only be used with fluorophores approved for use within the specified spectral ranges; and

(v) A warning that the device is not a standalone diagnostic.

Dated: December 17, 2021.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2021–28160 Filed 12–28–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 882

[Docket No. FDA–2021–N–0855]

Medical Devices; Neurological Devices; Classification of the Cerebrospinal Fluid Shunt System

AGENCY: Food and Drug Administration, HHS.

ACTION: Final amendment; final order.

SUMMARY: The Food and Drug Administration (FDA or we) is classifying the cerebrospinal fluid shunt system into class II (special controls). The special controls that apply to the device type are identified in this order and will be part of the codified language for the cerebrospinal fluid shunt system's classification. We are taking this action because we have determined that classifying the device into class II (special controls) will provide a reasonable assurance of safety and effectiveness of the device. We believe this action will also enhance patients' access to beneficial innovative devices.

DATES: This order is effective December 29, 2021. The classification was applicable on August 22, 2014.

FOR FURTHER INFORMATION CONTACT: Xiaolin Zheng, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 2674, Silver Spring, MD 20993–0002, 301–796–2823, *Xiaolin.Zheng@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Upon request, FDA has classified the cerebrospinal fluid shunt system as class II (special controls), which we have determined will provide a reasonable assurance of safety and effectiveness. In addition, we believe this action will enhance patients' access to beneficial innovation.

The automatic assignment of class III occurs by operation of law and without any action by FDA, regardless of the level of risk posed by the new device. Any device that was not in commercial distribution before May 28, 1976, is automatically classified as, and remains within, class III and requires premarket approval unless and until FDA takes an action to classify or reclassify the device (see 21 U.S.C. 360c(f)(1)). We refer to these devices as ''postamendments devices'' because they were not in commercial distribution prior to the date of enactment of the Medical Device Amendments of 1976, which amended the Federal Food, Drug, and Cosmetic Act (FD&C Act).

FDA may take a variety of actions in appropriate circumstances to classify or reclassify a device into class I or II. We may issue an order finding a new device to be substantially equivalent under section 513(i) of the FD&C Act (21 U.S.C. 360c(i)) to a predicate device that does not require premarket approval. We determine whether a new device is substantially equivalent to a predicate by means of the procedures for premarket notification under section 510(k) of the FD&C Act (21 U.S.C. 360(k) and part 807 (21 CFR part 807).

FDA may also classify a device through ''De Novo'' classification, a common name for the process authorized under section 513(f)(2) of the FD&C Act. Section 207 of the Food and Drug Administration Modernization Act of 1997 established the first procedure for De Novo classification (Pub. L. 105–115). Section 607 of the Food and Drug Administration Safety and Innovation Act modified the De Novo application process by adding a second procedure (Pub. L. 112–144). A device sponsor may utilize either procedure for De Novo classification.

Under the first procedure, the person submits a 510(k) for a device that has not previously been classified. After receiving an order from FDA classifying the device into class III under section 513(f)(1) of the FD&C Act, the person then requests a classification under section 513(f)(2).

Under the second procedure, rather than first submitting a 510(k) and then a request for classification, if the person determines that there is no legally marketed device upon which to base a determination of substantial equivalence, that person requests a classification under section 513(f)(2) of the FD&C Act.

Under either procedure for De Novo classification, FDA is required to classify the device by written order within 120 days. The classification will be according to the criteria under section 513(a)(1) of the FD&C Act. Although the device was automatically placed within class III, the De Novo classification is considered to be the initial classification of the device.

We believe this De Novo classification will enhance patients' access to beneficial innovation. When FDA classifies a device into class I or II via the De Novo process, the device can serve as a predicate for future devices of that type, including for 510(k)s (see section 513(f)(2)(B)(i) of the FD&C Act). As a result, other device sponsors do not have to submit a De Novo request or premarket approval application to market a substantially equivalent device (see section 513(i) of the FD&C Act, defining ''substantial equivalence''). Instead, sponsors can use the less-burdensome 510(k) process, when necessary, to market their device.

II. De Novo Classification

For this device, FDA issued an order on November 27, 2012, finding the Medtronic DUET™ External Drainage and Monitoring System (EDMS) not substantially equivalent to a predicate device and not subject to a premarket approval application (PMA). Thus, the device remained in class III in accordance with section 513(f)(1) of the FD&C Act when we issued the order.

On December 21, 2012, FDA received Medtronic Neurosurgery's request for De Novo classification of the Medtronic DUET™ EDMS. FDA reviewed the request in order to classify the device under the criteria for classification set forth in section 513(a)(1) of the FD&C Act.

We classify devices into class II if general controls by themselves are insufficient to provide reasonable assurance of safety and effectiveness, but there is sufficient information to establish special controls that, in combination with the general controls, provide reasonable assurance of the safety and effectiveness of the device for its intended use (see section 513 (a)(1)(B) of the FD&C Act). After review of the information submitted in the request, we determined that the device can be classified into class II with the establishment of special controls. FDA has determined that these special controls, in addition to the general controls, will provide reasonable assurance of the safety and effectiveness of the device.

Therefore, on August 22, 2014, FDA issued an order to the requester classifying the device into class II. In this final order, FDA is codifying the classification of the device by adding 21 CFR 882.5560.[1] We have named the generic type of device cerebrospinal fluid shunt system, and it is identified as a prescription device used to monitor and divert fluid from the brain or other part of the central nervous system to an internal delivery site or an external receptacle for the purpose of preventing spinal cord ischemia or injury during procedures that require reduction in central nervous system pressure. A cerebrospinal fluid shunt system may include catheters, valved catheters, valves, connectors, and pressure monitors intended to facilitate use of the shunt or evaluation of a patient with a shunt.

FDA has identified the following risks to health associated specifically with this type of device and the measures required to mitigate these risks in table 1.

TABLE 1—CEREBROSPINAL FLUID SHUNT SYSTEM RISKS AND MITIGATION MEASURES

Identified risks	Mitigation measures
Pyrogenicity/adverse tissue reaction	Biocompatibility testing, Pyrogenicity testing, Labeling, Shelf-life testing, and Sterility testing.
Infection (including meningitis)	Labeling, Sterility testing, and Package integrity testing.
Cerebrospinal fluid (CSF) leakage	Labeling, and Non-clinical performance testing.
Over- and under-drainage	Labeling, and Non-clinical performance testing.

[1] FDA notes that the ACTION caption for this final order is styled as ''Final amendment; final order,'' rather than ''Final order.'' Beginning in December 2019, this editorial change was made to indicate that the document ''amends'' the Code of Federal Regulations. The change was made in accordance with the Office of Federal Register's (OFR) interpretations of the Federal Register Act (44 U.S.C. chapter 15), its implementing regulations (1 CFR 5.9 and parts 21 and 22), and the Document Drafting Handbook.

TABLE 1—CEREBROSPINAL FLUID SHUNT SYSTEM RISKS AND MITIGATION MEASURES—Continued

Identified risks	Mitigation measures
• Spinal headache with and without CSF leakage. • Intracranial hemorrhage. • Hematoma (*e.g.,* spinal, subdural). • Paraplegia. • Foreign body obstruction.	
Procedural/use errors	Labeling.

FDA has determined that special controls, in combination with the general controls, address these risks to health and provide reasonable assurance of safety and effectiveness. For a device to fall within this classification, and thus avoid automatic classification in class III, it would have to comply with the special controls named in this final order. The necessary special controls appear in the regulation codified by this order. This device is subject to premarket notification requirements under section 510(k) of the FD&C Act.

At the time of classification, cerebrospinal fluid shunt systems are for prescription use only. Prescription devices are exempt from the requirement for adequate directions for use for the layperson under section 502(f)(1) of the FD&C Act (21 U.S.C. 352(f)(1)) and 21 CFR 801.5, as long as the conditions of 21 CFR 801.109 are met.

III. Analysis of Environmental Impact

The Agency has determined under 21 CFR 25.34(b) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

IV. Paperwork Reduction Act of 1995

This final order establishes special controls that refer to previously approved collections of information found in other FDA regulations and guidance. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521). The collections of information in the guidance document ''De Novo Classification Process (Evaluation of Automatic Class III Designation)'' have been approved under OMB control number 0910–0844; the collections of information in 21 CFR part 820, regarding quality system regulation, have been approved under OMB control number 0910–0073; the collections of information in 21 CFR part 814, subparts A through E, regarding premarket approval, have been approved under OMB control number 0910–0231; the collections of information in part 807, subpart E, regarding premarket notification submissions, have been approved under OMB control number 0910–0120; and the collections of information in 21 CFR part 801, regarding labeling, have been approved under OMB control number 0910–0485.

List of Subjects in 21 CFR Part 882

Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act, and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 882 is amended as follows:

PART 882—NEUROLOGICAL DEVICES

■ 1. The authority citation for part 882 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 360l, 371.

■ 2. Add § 882.5560 to subpart F to read as follows:

§ 882.5560 Cerebrospinal fluid shunt system.

(a) *Identification.* A cerebrospinal fluid shunt system is a prescription device used to monitor and divert fluid from the brain or other part of the central nervous system to an internal delivery site or an external receptacle for the purpose of preventing spinal cord ischemia or injury during procedures that require reduction in central nervous system pressure. A cerebrospinal fluid shunt system may include catheters, valved catheters, valves, connectors, and pressure monitors intended to facilitate use of the shunt or evaluation of a patient with a shunt.

(b) *Classification.* Class II (special controls). The special controls for this device are:

(1) The device description must include a detailed summary of the device technical parameters, including design configuration, dimensions, engineering drawings, and a list of all components with identification of their materials of construction.

(2) The patient-contacting components of the device must be demonstrated to be biocompatible.

(3) Non-clinical performance testing must demonstrate that the device performs as intended under anticipated conditions of use. The following performance characteristics must be tested:

(i) Simulated use testing must be conducted to characterize fluid flow and resistance to leakage; and

(ii) Mechanical integrity testing of all connections must be conducted.

(4) Performance data must support the shelf life of the device by demonstrating continued sterility, package integrity, and device functionality over the specified shelf life.

(5) Performance data must demonstrate the sterility and pyrogenicity of patient-contacting components of the device.

(6) The labeling must include:

(i) Contraindications with respect to patients who should not receive a lumbar drain;

(ii) A warning that the device should have 24-hour-a-day availability of trained personnel to supervise monitoring and drainage;

(iii) Instructions on proper device setup, positioning, and monitoring;

(iv) Warnings and precautions to inform the user of serious hazards and special care associated with the use of the device;

(v) A statement that the device is not to be reused, reprocessed, or resterilized when open but unused; and

(vi) Cleaning instructions for the injection sites.

Dated: December 17, 2021.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2021–28157 Filed 12–28–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2520

RIN 1210–AB97

Revision of Annual Information Return/Reports

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Final forms revisions.

SUMMARY: This document contains final revisions to the instructions for the Form 5500 Annual Return/Report of Employee Benefit Plan and Form 5500–SF Short Form Annual Return/Report of Small Employee Benefit Plan effective for plan years beginning on or after January 1, 2021. These final revisions to the instructions were included in a broader proposal of form and instruction changes published on September 15, 2021. The limited number of instruction changes in this document implement annual reporting changes for multiple-employer plans (including pooled employer plans) that result from statutory provisions in section 101 of the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act). The other changes to the Form 5500 Annual Return/Report included in the September 2021 proposal will be the subject of one or more separate and later final notices.

DATES: The final instruction revisions in this document are effective for plan years beginning on or after January 1, 2021. The Form 5500 Annual Return/Report for the 2021 plan year generally is not required to be filed until seven months after the end of the 2021 plan year, *e.g.,* July 2022 for calendar year plans, and a 2½-month extension is available.

FOR FURTHER INFORMATION CONTACT: Janet Song or Florence Novellino, Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, (202) 693–8500, (this is not a toll-free number).

Customer service information: Individuals interested in obtaining information from the DOL concerning Title I of Employee Retirement Income Security Act of 1974 (ERISA) may call the EBSA Toll-Free Hotline at 1–866–444–EBSA (3272) or visit the DOL's website (*www.dol.gov/agencies/ebsa*).

SUPPLEMENTARY INFORMATION:

I. Background

Titles I and IV of Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (Code), generally require pension and other employee benefit plans to file annual returns/reports concerning, among other things, the financial condition and operations of the plans. Filing a Form 5500 Annual Return/Report of Employee Benefit Plan (Form 5500) or, if eligible, a Form 5500–SF Short Form Annual Return/Report of Small Employee Benefit Plan (Form 5500–SF), together with any required schedules and attachments (together ''the Form 5500 Annual Return/Report''),[1] in accordance with their instructions, generally satisfies these annual reporting requirements. ERISA section 103 broadly sets out annual financial reporting requirements for employee benefit plans under Title I of ERISA. The Form 5500 Annual Return/Report for Title I purposes is promulgated pursuant to DOL regulations under the ERISA provisions authorizing limited exemptions and simplified reporting and disclosure for welfare plans under ERISA section 104(a)(3), simplified annual reports under ERISA section 104(a)(2)(A) for pension plans that cover fewer than 100 participants, and alternative methods of compliance for all pension plans under ERISA section 110. The Form 5500 Annual Return/Report, and related instructions and regulations, are also promulgated under the DOL's general regulatory authority in ERISA sections 109 and 505.

The Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act), included various provisions designed to improve the private employer-based retirement system that either directly changed or necessitated changes to the annual reporting requirements under ERISA and the Code.[2] On September 15, 2021, the DOL, the Internal Revenue Service (IRS), and the Pension Benefit Guaranty Corporation (PBGC) (collectively ''the Agencies'') published a notice of proposed forms revisions (NPFR) to amend the Form 5500 Annual Return/Report to implement the SECURE Act and related reporting changes with a limited number of proposed forms revisions beginning with the 2021 reporting year; with most of the proposed revisions not applying until the 2022 reporting year. 86 FR 51488 (Sept. 15, 2021). The DOL simultaneously published a proposed rulemaking (NPRM) required to implement the proposed forms revisions. 86 FR 51284 (Sept. 15, 2021). The Agencies received 114 comments on the NPFR and NPRM. The comments, which were all posted on the Department's website, generally focus on the proposed changes for the 2022 plan year forms. This document is limited to the changes for the 2021 plan year forms. Specifically, the reporting changes are revisions to the instructions that: (1) Implement the SECURE Act amendment to ERISA section 103(g) by requiring multiple employer defined contribution pension plans to include aggregate account balance information by employer on their existing Form 5500 attachment on participating employer information; and (2) noting that a pooled employer plan is a multiple employer plan that files a single Form 5500 Annual Return/Report, and requiring such plans to indicate in an attachment to their Form 5500 (i) whether the plan's pooled plan provider complied with the Form PR registration requirements for pooled plan providers; and (ii) if the answer is yes, to provide the AckID number for the pooled plan provider's latest Form PR filing.[3] Although not a change to the instructions, in response to comments raising the issue, this document also advises filers that the Department is continuing the current requirement that welfare plans that file a Form 5500 must include participating employer information notwithstanding that the SECURE Act amended ERISA section 103(g) to limit that specific section to retirement plans. No changes to the DOL's implementing regulations are required for these instruction changes. The Agencies intend to address the other changes to the Form 5500 and related regulations proposed in the September 2021 NPFR and NPRM in one or more other separate and later Notices of Adoption of Final Forms Revisions and Notices of Final Rulemaking. The instruction changes

[1] References to the ''Form 5500 Annual Return/Report'' may include, depending on the context, the Form 5500, the Form 5500–SF, and the Form 5500–EZ, Annual Return of One Participant (Owners and Their Spouses) Retirement Plan. The Form 5500–EZ is a return that is required only to satisfy the Code. Form 5500–EZ filers are not subject to Title I of ERISA.

[2] The SECURE Act was enacted on December 20, 2019, as Division O of the Further Consolidated Appropriations Act, 2020 (Pub. L. 116–94).

[3] These requirements for pooled employer plans are limited to the Form 5500 because the Form 5500–SF instructions provide, consistent with the proposal, that pooled employer plans are not eligible to file the Form–SF. The proposal would also have required that all multiple employer plans file the Form 5500 regardless of whether they would otherwise be eligible to file the Form 5500–SF. The Department is not adopting that change for all MEPs in the 2021 forms but intends to address that proposed change in a separate and later Notice.

being added beginning with the 2021 reporting year are discussed below.

II. 2021 Form 5500 Annual Return/Report Changes for MEPs and Pooled Empoyer Plans

SECURE Act section 101 amended ERISA section 3(2) and added ERISA sections 3(43) and 3(44) to allow for a new type of ERISA-covered multiple employer pension plan (MEP) for plan years beginning on or after January 1, 2021—a defined contribution pension plan called a ''pooled employer plan'' operated by a ''pooled plan provider.'' Pooled employer plans allow multiple unrelated employers to participate without the need for any common interest among the participating employers (other than having adopted the plan). Under section 3(2) of ERISA, as amended by the SECURE Act, a pooled employer plan is treated for purposes of ERISA as a single plan that is a multiple employer plan. New section 3(44) of ERISA establishes requirements for pooled plan providers, including a requirement to register with the DOL before beginning operations as a pooled plan provider. A parallel requirement to file a registration statement with the Secretary of Treasury is in section 413(e)(3)(A)(ii) of the Code. On November 16, 2020, the DOL published a notice of final rulemaking establishing the registration requirement for pooled plan providers. 85 FR 72934 (Nov. 16, 2020). The Treasury Department and the IRS have advised that filing the Form PR with the DOL will satisfy the requirement to register with the Secretary of the Treasury. The instructions to the Form PR (Pooled Plan Provider Registration) (Form PR) advised registrants to use the same identifying information on the Forms 5500 Annual Return/Report filed by the pooled employer plans, particularly name; EIN for the pooled plan provider; any identified affiliates providing services; trustees; and plan name and number for each pooled employer plan.

Section 101 of the SECURE Act also amended ERISA section 103(g), effective for plan years beginning on or after January 1, 2021. Section 103(g) was added to ERISA by the Cooperative and Small Employer Charity Pension Flexibility Act (CSEC Act) in 2014.[4] Prior to the SECURE Act amendment, section 103(g) required multiple employer plans to include with their annual reports ''a list of participating employers'' and, with respect to each participating employer, ''a good faith estimate of the percentage of total contributions made by such participating employer during the plan year.'' In response to the CSEC Act, the Form 5500 instructions for 2014 and later were amended to provide for all multiple employer plans to include the section 103(g) information as a nonstandard attachment.[5] SECURE Act section 101(d) amended ERISA section 103(g) by providing that annual reports for ''any plan to which [ERISA] section 210(a) applies (including a pooled employer plan)'' also must include two additional pieces of information: (1) The aggregate account balances attributable to each employer in the plan (determined as the sum of the account balances of the employees of such employer and the beneficiaries of such employees), and (2) with respect to a pooled employer plan, identifying information for the person designated under the terms of the plan as the pooled plan provider.

As discussed in the NPFR, the statutory establishment of pooled employer plans as a type of multiple employer plan under Title I of ERISA requires some adjustments to the Form 5500 Annual Return/Report to acknowledge the existence of this new type of plan and to confirm that pooled employer plans must file a Form 5500 Annual Return/Report in accordance with the requirements that apply to other MEPs that file the Form 5500. The adjustments to accommodate pooled employer plan reporting on the Form 5500 were presented in the NPFR largely in the form of a new proposed Schedule MEP and its instructions that would be a required part of the Form 5500 Annual Return/Report for various types of MEPs, including pooled employer plans. As proposed, however, the Schedule MEP would not be effective until plan years beginning on or after January 1, 2022, but under the SECURE Act, pooled employer plans could begin operating for plan years beginning on or after January 1, 2021. In order to implement core elements of the SECURE Act section 101(d) reporting requirements on a timely basis, the NPFR included proposed amendments to the instructions for the 2021 Form 5500 and Form 5500–SF, specifically for the multiple-employer plan check box that is currently on Part I, line A of the Form 5500 and Form 5500–SF. Upon review of the public comments, the Department continues to believe that amending those instructions is an efficient and appropriate way to provide for the reporting of ERISA section 103(g) information for the 2021 reporting year.

Specifically, the instructions to the 2021 Form 5500[6] for Part I, Line A (the multiple-employer plan checkbox) are being amended to note that (1) a pooled employer plan operated by a pooled plan provider that meets the definition under ERISA section 3(43) is a multiple employer plan, and (2) like other ERISA-covered pension MEPs, a single Form 5500 Annual Return/Report is required to be filed for a pooled employer plan.[7] The 2021 instructions to the Form 5500 and Form 5500–SF for the multiple-employer plan check box are being further amended to require MEPs to include a new data element on the currently required 2021 non-standard attachment, specifically the ''Aggregate Account Balances Attributable to Participating Employer'' (element 4). The instructions to the multiple-employer plan check box currently provide that the Annual Return/Report filed for a multiple-employer plan (MEPs and multiple employer welfare plans) must include a non-standard attachment that identifies the participating employers in the plan by name and employer identification number (EIN) and include for each participating employer an estimate of

[4] Public Law 113–97 (Apr. 7, 2014).

[5] 79 FR 66617 (Nov. 10, 2014).

[6] As noted above, pooled employer plans are not eligible to file the Form 5500–SF so the instructions describing the pooled employer plan's status as a MEP are not being added to the Form 5500–SF instructions.

[7] A commenter presenting itself as representing accounting industry interests asked for clarification regarding audit requirements for pooled employer plans. To some extent, however, the comment incorrectly assumed that a pooled employer plan operates as an aggregation of many plans, rather than as a single ERISA-covered plan. For example, the commenter asked ''If a pooled employer plan is comprised of hundreds of plans, will each plan be required to be audited annually?'' The commenter also asked ''If the DOL permits rotation of audit procedures for plans participating in a pooled employer plan, how will that be determined?'' The commenter also asked ''Will the DOL provide guidance for the auditor if there are one or more plans within the pooled employer plan that are not compliant with the plan document or with ERISA?'' A pooled employer plan, like other MEPs, is a single plan covering the employees of multiple employers. It is not comprised of multiple separate plans, as would be true of the proposed new direct filing entity the ''DCG.'' The Department notes that nothing in the SECURE Act changed the ERISA independent qualified public accountant (IQPA) audit requirements as they apply to pooled employer plans. Rather, under ERISA, pooled employer plans are subject to the Form 5500 Annual Return/Report requirements that apply generally to employee pension benefit plans, including the audit requirements under ERISA that apply to employee pension benefit plans generally. As such, the audit must be performed in accordance with Generally Accepted Auditing Standards (GAAS), which are established by the accounting industry not the Department. How GAAS applies to pooled employer plans, including any differences in audit procedures that may be required under GAAS, are issues that are beyond the scope of these forms revisions.

the percentage of total contributions for the plan year made by each employer.[8]

Some commenters asked that the Department interpret the SECURE Act's requirement to report employer-level aggregate account balances as applying only to defined contribution MEPs. The commenters noted that neither the operative language of the SECURE ACT nor its legislative history support applying this requirement to defined benefit pension plans that do not maintain ''account balances'' for each employee. Two of these commenters noted that this requirement is particularly inappropriate for defined benefit MEPs established before 1989 that determine their minimum funding requirements as if all participants were employed by a single employer and, therefore, did not elect ''employer-by-employer'' treatment under the Technical and Miscellaneous Revenue Act of 1988 (TAMRA). One of the commenters also noted that participants already receive annual funding notices on their defined benefit pension plan, so reporting of an artificial ''account balance'' could give the false impression that, in these MEPs, specific assets are set aside to provide benefits for employees of each employer when, in fact, all of the assets of a defined benefit MEP (like any other defined benefit pension plan) are available to pay all of the benefits of all of the participants in that MEP, regardless of where the participants are employed.

The Department agrees that the SECURE Act's requirement to report employer-level aggregate account balances should not apply to defined benefit pension MEPs. The SECURE Act expressly states that the aggregate account balances attributable to each employer in the plan is to be determined ''as the sum of the account balances of the employees of such employer (and the beneficiaries of such employees).'' Although the SECURE Act amended ERISA section 103(g) to provide that it applies to plans subject to ERISA section 210(a), and there may be a relatively small number of defined benefit MEPs that are subject to ERISA section 210(a), in the Department's view, it would not be a reasonable reading of the statutory text to conclude that Congress intended by the reference to ERISA section 210(a) to mandate that aggregate account balance information be reported by defined benefit plans that do not maintain account balances for covered participants. Accordingly, the final instructions for the 2021 reporting year provide that only defined contribution MEPs must report the new SECURE Act required employer-level aggregate account balances.

One commenter requested clarification of the requirement to report the ''Percentage of Total Contributions for the Plan Year'' (element 3 for the 2021 non-standard attachment). Specifically, the commenter asked whether the total of all participating employers must equal 100 percent, and whether it will cause red flags with the DOL/IRS if it does not. They also asked whether filers should round the percentage entry for each employer to decimal places, and if so, how many. The Department read these commenter's questions as primarily directed at issues that may arise when in the context of a standardized Schedule MEP structure for reporting this information. The Agencies will take into account such questions in designing the form and developing appropriate instructions and edit tests. For the 2021 reporting year, as noted above, the instructions will continue to allow filers to use a non-standard attachment to report the required information. The Department also notes that this is not a new reporting requirement. It has been part of the Form 5500 since it was added in 2014 in response to the CSEC Act addition of section 103(g) to Title I of ERISA. Nonetheless, for the 2021 reporting year, it would be acceptable for filers to round to the nearest whole number similar to rounding conventions that apply to the Form 5500 financial statements and schedules. To the extent the filer's concern is whether rounding could result in the total reported percentage either slightly above or slightly below 100 percent, the filer can indicate that on the non-standard attachment as part of its filing.

A commenter asked for guidance on the asset values that should be used for the ''Aggregate Account Balances Attributable to Participating Employer'' (element 4 for the 2021 non-standard attachment) and, in particular, whether the end of year net value may be used based on the values reported on the Schedules H and I. The SECURE Act expressly states that the aggregate account balances information should be determined as the sum of the account balances of the employees of such employer and the beneficiaries of such employees. In the Department's view, an end of year valuation is an appropriate reporting requirement as it will provide the most up to date value for the plan year covered by the Form 5500 report. The final instructions include directions to that effect. Further, rounding to the nearest dollar, as with the financial reporting on other parts of the Form 5500 and schedules, would be appropriate. The final instructions have been revised to provide this clarification as well.[9]

With respect to the additional ERISA section 103(g) information regarding pooled employer plans that must be included for the 2021 reporting year, the Department had proposed that the substance of the proposed Schedule MEP changes would apply to the 2021 reporting year requirements except that the information could be filed as a non-standard attachment. The Department received comments opposing or expressing concern about some elements of the proposed Schedule MEP. Since the Department intends to address those comments and resolve the Schedule MEP content requirement in a later final rule, the Department agrees that it would be premature to impose the requirements wholesale to the 2021 Form 5500 Annual Return/Reports. Rather, for the 2021 reporting year, in addition to the participating employer information required for all MEPs, pooled employer plans only will be required to indicate, on a non-standard attachment, whether they are in compliance with the Form PR registration requirements and provide the AckID number for their latest Form PR filing.[10]

Some commenters complained that pooled employer plans should not be required to provide the AckID number, claiming that this requirement was unnecessary because the Department already has the Form PR and issued the AckID number. Some commenters suggested that asking any questions about the pooled plan provider was duplicative of the Form PR and that the ''AckID'' could be found by a separate

[8] The instruction further provides that unfunded, fully insured, or combination unfunded/insured multiple employer welfare plans that are exempt under 29 CFR 2520.104–44 from filing financial statements with their annual report must attach a list of participating employers, but do not have to include an estimated amount of contributions from each employer.

[9] The Department understands from some comments on the proposal that, depending on the treatment of receivables and forfeitures by the plan, the sum of the account balances of the employees of each employer and the beneficiaries of such employees may not match the net asset value reported on Schedule H or I. The Department believes that the aggregate account balance information should be calculated and reported in accordance with the statutory direction in the SECURE Act. Filers can add an explanatory statement to the extent they wish to explain any difference between that sum and other total asset values reported on the Form 5500.

[10] AckID is the acknowledgement code generated by the system in response to a completed filing for the most recent Form PR submitted. The instructions to the Form PR advise the pooled plan provider that it must keep, under ERISA section 107, the electronic receipt for the Form PR filing as part of the records of the pooled employer plans operated by the pooled plan provider.

internet search. A few commenters also argued that pooled employer plans should not be subject to special reporting standard and that subjecting pooled employer plans to heightened scrutiny, when other plans treated as single plans are not, is arbitrary and unsupported by statute. A commenter further argued that the question regarding whether the pooled plan provider is currently in compliance with the Form PR (Pooled Plan Provider Registration Statement) requirements is ambiguous and unclear, given the lack of guidance and pending agency rulemakings (*e.g.,* IRS' one bad apple guidance).

The Department disagrees with the commenters opposing the collection of information regarding the Form PR. In the preamble to the final regulation establishing the Form PR, the DOL specifically noted that it would add new questions on the Form 5500 that would ask whether a pooled plan provider filed its registration statement with the Secretary, including any required updates, and to report the electronic confirmation number provided to the pooled plan provider at the time that the registration was received. Further, as explained in the preamble to the proposal to add this information collection item for pooled employer plans, the questions related to the Form PR are intended to provide the Department, the Treasury Department, the IRS, participating employers, and other stakeholders with information that would allow them to connect the Form PR registration with the Form 5500 for all pooled employer plans operated by the registrant. 85 FR 72934, 72946 (Nov. 16, 2020). In fact, one commenter representing retirees and plan participants specifically indicated its support for requesting the ''AckID'' to help workers and retirees keep track of their assets and the plan, especially with the anticipated limited involvement of their employer in the design of pooled employer plans. Also, as discussed above, SECURE Act section 101(d) specifically requires the annual report of pooled employer plans to include identifying information for the person designated under the terms of the plan as the pooled plan provider. Thus, the requirement is neither arbitrary nor unsupported by the statute. The AckID requirement is also similar to the questions currently on the Form 5500 that require multiple employer group health plans to report about their compliance with registration and reporting requirements on the Form M–1 (Report for Multiple Employer Welfare Arrangements (MEWAs) and Certain Entities Claiming Exception (ECEs)). The Department also does not agree that the filing requirements are ambiguous, that there is a lack of guidance regarding the filing requirement, or that it is unfair to require pooled employer plans to report on the registration status of their pooled plan providers. Unlike other ERISA-covered multiple employer plans, the SECURE Act expressly sets forth roles and responsibilities for pooled plan providers. One of those clear requirements is that the pooled plan provider must register with the Department and with the IRS. The Form PR was adopted after public notice and comment to implement a specific registration requirement added to ERISA by the SECURE Act. The Form PR also includes instructions for completing the form, which also were developed as part of the notice and comment rulemaking process. The Form 5500 is signed by the plan administrator stating that the administrator has reviewed the filing and that ''to the best of my knowledge and belief, it is true, correct, and complete.'' In the case of a pooled employer plan, the pooled plan provider is the administrator. Pooled plan providers should be able to say whether they believe the Form PR filing requirements have been met. In the Department's view, it does not impose any meaningful burden on the pooled plan provider acting as the plan administrator to acknowledge on the plan's Form 5500 annual report that it believes to the best of the pooled plan provider's knowledge and belief that it has fulfilled its statutory registration obligation. Further, the DOL continues to believe that linking the Form PR filed by a pooled plan provider to the Forms 5500 is a reasonable method to help make sure that workers, retirees, and the agencies charged with oversight have the information they need to be sure that the Form PR information is consistent and up to date. For example, having the AckID number on the plan's Form 5500 will assist plan participants and participating employers in finding the relevant Form PR on the Department's website. The requirement to report Form PR compliance information on the Form 5500 will also help the Department ensure compliance with those registration requirements. While there is no explicit civil penalty for failing to file a Form PR, there is a civil penalty for failing to file a complete and accurate Form 5500. *See* ERISA section 502(c)(2); 29 CFR 2560.502(c)(2) and the Federal Civil Penalties Inflation Adjustment Act of 1990.

Finally, with respect to the requirement that multiple employer welfare plans file the participating employer information as a non-standard attachment to the 2021 Form 5500 Annual Return/Report, one commenter representing retirees and plan participants specifically indicated its support for continuing to require multiple employer welfare plans to provide participating employer information. Two commenters argued to the contrary that the DOL could no longer ask multiple employer welfare plans to report any participating employer information because Congress, by amending ERISA section 103(g) to add a reference to plans subject to ERISA section 210(a), was explicitly saying that welfare plans should no longer report such information. One of the commenters noted that DOL had cited ERISA section 103(c)(2) as separate authority for DOL to require welfare plans to report such information, but argued that section 103(c)(2) was not applicable because the DOL is not establishing this reporting requirement to obtain ''the name and address of each fiduciary'' but rather to reinstate a reporting requirement that was repealed by the SECURE Act.

Although the DOL agrees that ERISA section 103(g) technically is not applicable to welfare plans as a result of the SECURE Act amendment, the DOL does not agree the SECURE Act amendment precludes its continued collection of participating employer information on the Form 5500 from multiple employer welfare plans.[11] Rather, DOL continues to believes that the addition of the reference to ERISA section 210(a) was meant to emphasize that defined contribution MEPs, including association retirement plans, professional employer organization plans (PEOs), and the newly created pooled employer plan, are required to comply with the participating employer reporting requirements. The DOL does not believe that the amendment was intended to preclude the Department from relying on other annual reporting authorities to collect participating employer information about multiple employer welfare arrangements (MEWAs). In the DOL's view, receiving participating employer information from MEWAs, including multiple employer welfare plans, is important for oversight

[11] This final rule does not address comments on the proposal in the NPFR to move the participating employer questions to the Form M–1 for MEWA plans and arrangements that provide medical benefits. As noted above, the proposals relating to changes for the 2022 reporting year will be addressed in a later, separate **Federal Register** notice.

of such arrangements by the Department and monitoring such arrangements by employers and plan participants and beneficiaries. This transparency about participating employers is supported by congressional findings in ERISA section 2 (Congressional Findings and Declaration of Policy), which provides, in relevant part, that ''[i]t is hereby declared to be in the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto. . . .'' In addition, the Committee Report on ERISA provided that ''[t]he Subcommittee intended that Congress provide for greater legislative protection for beneficiaries of pension plans through detailed public disclosure of the administration and operation of private pension plans.'' S. Rep. 93–127 (Apr. 18, 1973).

DOL is also continuing to rely on ERISA section 103(c)(2) and its general regulatory authority under ERISA section 505 as authority for requiring multiple employer welfare plans to continue reporting the participating employer information for the 2021 plan year filing.[12] As discussed in the NPFR, in the DOL's view, each participating employer is acting as a fiduciary with respect to its decision to join the MEWA and provide ERISA-covered benefits through a MEWA, and has ongoing fiduciary obligations to monitor the plan and confirm that continued participation in the plan is prudent and in the best interests of its employees who are covered participants in the plan.[13] Nothing in ERISA section 103(c)(2) precludes the Department from relying on that authority to collect information about a particular class or group of fiduciaries as opposed to requiring the identification of all plan fiduciaries in general. *See* also ERISA section 104(a)(3) (authority to exempt welfare benefit plans from all or part of Title I reporting and disclosure requirements). With respect to its general regulatory authority under ERISA section 505, the Department explained in the preamble to the proposal that the participating employer information has proven useful to the DOL for its oversight functions for both MEPs and those MEWAs that file the Form 5500, regardless of the types of benefits provided by the MEWA. 86 FR at 51498. This reporting requirement is also relevant to the Department's enforcement of the criminal penalties added by the Affordable Care Act under ERISA section 519 for any person who knowingly submits false statements or false representations of fact in connection with a MEWA's financial condition (including a plan MEWA), the benefits it provides, or its regulatory status as a MEWA. In light of the fact that participating employers in a MEWA would likely be the recipients of such false statements or representations, having data regarding the participating employers in a MEWA plan would be useful in policing whether such false statements or representations are being made to participating employers.

Two commenters argued that reporting of employer names and EINs (and the health plan to which they are linked) on a publicly available document exposes plan participants and beneficiaries and their employers to potential cybersecurity fraud. They also argued that the list of participating employers and contribution percentage information is proprietary information and contended that making the information publicly available would negatively impact businesses and their employees. The commenters did not offer empirical evidence or other data to support their assertions about consequences to plan participants and beneficiaries or the participating employers' businesses. This reporting requirement has been in place since the 2014 plan year and the Department is not aware of any such consequences resulting from the disclosure requirement. In fact, the more powerful argument here is likely that employers have the freedom to choose to change plans or plan service providers, are undoubtedly receiving marketing solicitations about these matters now, and that transparency about which employers participate in a plan MEWA may well generate competitive pressures to offer better services at lower fees.

The DOL also has addressed similar arguments on several prior occasions in the context of the ERISA section 103(g) requirement for multiple employer plans to include participating employer information as part of the Form 5500 Annual Return/Report. For example, in a 2019 Field Assistance Bulletin, the DOL noted that it had received and considered similar objections in connection with the Paperwork Reduction Act (PRA) notice associated with the publication of the interim final rule on ERISA section 103(g) that implemented the CSEC Act requirement. *See* Proposed Extension of Information Collection Request Submitted for Public Comment; Revisions to Annual Return/Report—Multiple-Employer Plans, 79 FR 66741 (Nov. 10, 2014) (available at *www.govinfo.gov/content/pkg/FR-2014-11-10/pdf/2014-26499.pdf*). The DOL also pointed out, in its 2016 **Federal Register** notice regarding proposed modernization of the Form 5500, that DOL addressed this issue when it explained its decision at that time not to propose changes to the ERISA section 103(g) reporting requirements. *See* Form 5500 Improvement and Modernization Proposal—Proposed Revision of Annual Information Return/Reports, 81 FR 47534, 47564–47565 (July 21, 2016) (available at *www.govinfo.gov/content/pkg/FR-2016-07-21/pdf/2016-14893.pdf*). In the SECURE Act itself Congress reaffirmed and in fact expanded the requirements for reporting participating employer information on the Form 5500. The Department does not believe that a different conclusion regarding these arguments is warranted just because they are now being presented separately for welfare plans. Although, as noted above, after the SECURE Act amendment the specific reporting requirement in ERISA section 103(g) technically is not applicable to welfare plans, the Department does not view the SECURE Act amendment as an acknowledgement that the cybersecurity and confidential information arguments being pressed by these commenters somehow now has merit with respect to just welfare plans notwithstanding the fact that multiple employer welfare plans have been required to file the participating employer information since the 2014 reporting year. The Department also continues to be of the

[12] ERISA section 103(c)(2) states that the administrator shall furnish as a part of a plan's annual report ''(2) The name and address of each fiduciary.'' ERISA section 505 provides the Department with general authority, subject to certain limits not relevant here, to ''prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this subchapter.''

[13] *See also* Advisory Opinion 2007–06A (Aug. 16, 2007) (''decisions regarding the method through which benefits are to be paid under an employee welfare benefit plan, including the selection of an insurer and the negotiation of the terms of any contractual arrangement obligating the plan, are matters that generally are subject to the fiduciary responsibility provisions of Title I of ERISA''.); Information Letter to Diana Ceresi (Feb. 2, 1998) (''when the selection of a health care provider involves the disposition of employee benefit plan assets, such selection is an exercise of authority or control with respect to the management and disposition of the plan's assets within the meaning of section 3(21) of ERISA, and thus constitutes a fiduciary act . . .''); Advisory Opinion 2018–01A (Nov. 5, 2018) (In the context of a pension plan rollover service provider, not covered by Title 1 of ERISA, ''When plan sponsors or other responsible fiduciaries choose to have a plan participate in the RCH Program, they are acting in a fiduciary capacity, and would be subject to the general fiduciary standards and prohibited transaction provisions of ERISA in selecting and monitoring the RCH Program.'')

view that an employer's sponsorship or participation in an ERISA-covered plan is not confidential information.[14] Employers that sponsor single employer plans are identified on the plan's Form 5500, and we do not see the identity of a sponsoring employer in a multiple employer plan as somehow different for annual reporting and disclosure purposes. Similarly, the purported cybersecurity issues noted by the comments (*e.g.,* ''spoofing'' of either the MEWA itself, or the MEWA's health insurer, in order to generate a phishing attack) are not different for an employer (including small employers) identified on a single-employer Form 5500 compared to a participating employer identified on a multiple employer Form 5500. In the Department's view, Form 5500 reporting of participating employer information is just as important for multiple employer welfare plans as retirement plans because it provides important information for oversight of such arrangements by the Department and monitoring such arrangements by employers and plan participants and beneficiaries. Accordingly, multiple employer welfare plans will continue to be required to file the participating employer information as a non-standard attachment to the 2021 Form 5500 Annual Return/Report, as they have been required to do since the 2014 plan year filing.

III. Regulatory Impact Analysis

1. Executive Order 12866

This Final Rule does not constitute a ''significant regulatory action'' for purposes of Executive Order 12866. The changes are minor additions to existing reporting requirements that in large part merely adopt requirements set forth in statutory amendments to the annual reporting requirements that apply under ERISA and the Code. Therefore, this action has not been reviewed by OMB pursuant to the Executive Order. Pursuant to the Congressional Review Act, OMB has determined that this final rule is not a ''major rule,'' as defined by 5 U.S.C. 804(2).

2. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)), the Department solicited comments concerning the information collection request (ICR) included in the revision of the Form 5500 Annual Return/Report. At the same time, the Department also submitted an information collection request (ICR) to the Office of Management and Budget (OMB), in accordance with 44 U.S.C. 3507(d).

The Department did not received comments that specifically addressed the paperwork burden analysis of the information collection requirement contained in the proposed rule.

In connection with publication of this final rule, the Department is submitting an ICR to OMB requesting a revision of the collection of information under OMB Control Number 1210–0110 reflecting the instruction changes being finalized in this document. The Department will notify the public when OMB approves the ICR.

A copy of the ICR may be obtained by contacting the PRA addressee shown below or at *www.RegInfo.gov*. PRA ADDRESSEE: Address requests for copies of the ICRs to James Butikofer, Office of Research and Analysis, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW, Room N–5655, Washington, DC 20210. Telephone: (202) 693–8410; Fax: (202) 219–4745; Email: *ebsa.opr@dol.gov*. These are not toll-free numbers. ICRs submitted to OMB also are available at *http://www.RegInfo.gov*.

The burden analysis is based on data from the 2019 Form 5500 filings (the latest year for which complete data are available). The burden analysis includes the burden of the current information collection and adjusts it for changes made by the final rule.

Burden estimates take into account the changes in plan counts due to the creation of pooled employer plans, with an increase in multiple-employer plans and a small decrease in single employer plans, reflecting some single employer plans moving to pooled employer plans. The agencies estimated that there are 4,538 defined contribution multiple-employer pension plans and that 75 pooled employer plans will be formed.

Reporting the information about participating employers required by the changes being finalized in this document should not be burdensome for defined contribution multiple-employer plan administrators as current requirements under ERISA already require them to maintain a list of participating employers and records of the contributions made by each employer. Although likely an overestimate of the actual time required, to ensure that we are not underestimating the potential burden, the Department is using an estimate of on average 30 minutes to comply with the new question for defined contribution MEPs regarding aggregate account balances on the currently required attachment to the Form 5500 Annual Return/Report containing the list of participating employers, their EINs, and their percentage of total plan contributions. The Department estimates that the anticipated 75 pooled employer plans would take an additional five minutes to indicate whether they are in compliance with the Form PR registration requirements and provide the AckID number for their latest Form PR filing.

The Agencies' burden estimation methodology excludes certain activities from the calculation of ''burden.'' If the activity is performed for any reason other than compliance with the applicable federal tax administration system or the Title I annual reporting requirements, it was not counted as part of the paperwork burden. For example, most businesses or financial entities maintain, in the ordinary course of business, detailed accounts of assets and liabilities, and income and expenses for the purposes of operating the business or entity. These recordkeeping activities were not included in the calculation of burden because prudent business or financial entities normally have that information available for reasons other than federal tax or Title I annual reporting. Only time for gathering and processing information associated with the tax return/annual reporting systems, and learning about the law, was included. In addition, an activity is counted as a burden only once if performed for both tax and Title I purposes. The Agencies also have designed the instruction package for the Form 5500 Annual Return/Report so that filers generally will be able to complete the Form 5500 Annual Return/Report by reading the instructions without needing to refer to the statutes or regulations. The Agencies, therefore, have considered in their PRA

[14] Prior guidance issued by the Department has generally rejected allegations of possible harm due to disclosure of reporting information in favor of the policy reasons in favor of public disclosure. *See, e.g.,* Aug. 14, 1994, letter to David Mintz (noting ERISA policy of public disclosure and rejecting concerns raised that the Form 5500 series is available to organizations that compile and sell to the public a directory of employee benefit plan information); April 7, 1978, letter to Congressman Harley O. Staggers (concluding nothing in section 110 supported changing the requirement, in response to claims that because personal financial information possibly could be calculated from 103(b)(3)(B) requirement for plans to include in their annual report a statement of receipts and disbursements during the preceding twelve-month period aggregated by general sources and applications, and thus should be treated as confidential information); July 23, 1981, letter to Mr. T.C. Heyward, Jr. (contested information did not fit within 106(b) exception from public disclosure and nothing in section 110 warranted omission from the annual report required information on distribution of benefits and payments directly to participants or their beneficiaries and total annual contribution of the sponsoring organization on the grounds that the information constitutes an invasion of privacy).

calculations the burden of reading the instructions and find there is no recordkeeping burden attributable to the Form 5500 Annual Return/Report.

This PRA calculation does not include any burden related to Form M–1 changes related to reporting of participating employer information by plans and non-plan MEWAs that are required to file the Form M–1 because those changes are not included in this document. Rather, for the 2021 Form 5500 reporting year, plan MEWAs, including those that offer or provide coverage for medical care, will continue to be required to provide participating employer information as a nonstandard attachment to the 2021 Form 5500 Annual Return/Report in substantially the same manner as has been required since the 2014 forms.

Note that to reflect OMB's preference that burden incurred by service providers be reported as hour burden instead of cost burden, burden that has historically been included as cost burden has been included here as hour burden. This change led to an increase in reported hour burden and an offsetting decrease in cost burden.

A summary of paperwork burden estimates follows. As noted above, these estimates include the burden of the overall Form 5500 information collection and makes adjustments for the final instructions revisions included in this document.

Type of Review: Revision of existing collection.

Title: Annual Information Return/Report of Employee Benefit Plan.

Affected Public: Individuals or households; Private Sector—Business or other for-profit; Not-for-profit institutions.

Forms: Form 5500 and Schedules.

Total Respondents: 840,923.

Total Responses: 840,923.

Frequency of Response: Annually.

Estimated Total Burden Hours: 3,031,649.

Estimated Total Annualized Costs: $0.

The aggregate hour burden for the Form 5500 Annual Return/Report (including schedules and short form) is estimated to be 4.5 million hours annually shared between the DOL, IRS, and the PBGC. The hour burden reflects filing activities carried out directly by filers.

Presented below is a chart showing the total hour and cost burden of the revised Form 5500 Annual Return/Report allocated to the DOL, including the changes to the DOL burden by these 2021 SECURE Act revisions.

		DOL hours
Pension	Large Plans	895,570
	Small Plans	931,031
Welfare	Large Plans	1,064,998
	Small Plans	64,616
Total	Large Plans	1,960,568
	Small Plans	995,647
DFEs		70,103
January 2013 Revision		646
2014 CSEC Revision		2,371
2021 SECURE Act Revision		2,313
Total		3,031,649

3. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) [15] imposes certain requirements with respect to federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act [16] and are likely to have a significant economic impact on a substantial number of small entities. Unless the head of an agency certifies that a final rule is not likely to have a significant economic impact on a substantial number of small entities, section 604 of the RFA requires the agency to present a final regulatory flexibility analysis of the final rule.[17]

The Department prepared an Initial Regulatory Flexibility Analysis at the proposed rule stage. However, this final rule is focused only on a subset of the requirements proposed. The Department certifies that this final rule will not have a significant impact on a substantial number of small entities. Therefore, the Department has not prepared a Final Regulatory Flexibility Analysis.

4. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 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 an expenditure of $100 million or more (adjusted annually for inflation with the base year 1995) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector.[18] For purposes of the Unfunded Mandates Reform Act, as well as Executive Order 12875,[19] this final rule does not include any federal mandate that the DOL expects would result in such expenditures by State, local, or tribal governments, or the private sector.

5. Federalism Statement

Executive Order 13132 outlines fundamental principles of federalism, and requires the adherence to specific criteria by federal agencies in the process of their formulation and implementation of policies that have ''substantial direct effects'' on the States, the relationship between the national government and States, or on the distribution of power and responsibilities among the various levels of government.[20] Federal agencies promulgating regulations that have federalism implications must consult with State and local officials and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the final rule.

In the DOL's view, this final rule would not have federalism implications because they would not have direct effects on the States, on the relationship between the national government and the States, or on the distribution of

[15] 5 U.S.C. 601 *et seq.* (1980).

[16] 5 U.S.C. 551 *et seq.* (1946).

[17] 5 U.S.C. 604 (1980).

[18] 2 U.S.C. 1501 *et seq.* (1995).

[19] Enhancing the Intergovernmental Partnership, 58 FR 58093 (Oct. 28, 1993).

[20] Federalism, *supra* note 6.

power and responsibilities among various levels of government. This final rule does not have federalism implications because they would have no 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. Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. The requirements implemented in these rules do not alter the fundamental provisions of the statute with respect to employee benefit plans, and as such would have no implications for the States or the relationship or distribution of power between the national government and the States.

IV. Final Revisions to the Form 5500 and Form 5500–SF Instructions for the 2021 Reporting Year

To implement the SECURE Act section 101 changes, the current instructions including the graphic, in the Form 5500 and Form 5500–SF instructions, as applicable, for Part I, Line A ''Box for Multiple Employer Plan'' and graphic entitled ''Multiple-Employer Plan Participating Employer Information,'' are replaced with instructions below and two separate graphics. The second graphic, which will appear only in the Form 5500 instructions shows information pooled employer plans must provide in addition to the participating employer information. It may be attached as part of the ''Multiple-Employer Plan Participating Employer Information'' attachment or as a separate attachment entitled ''Pooled Employer Plan Information.''

Line A—Box for Multiple-Employer Plan. Check this box if the [Form 5500 or Form 5500–SF] is being filed for a multiple-employer plan. A multiple-employer plan is a plan that is maintained by more than one employer and is not one of the plans already described. A multiple-employer plan can be collectively bargained and collectively funded, but if covered by PBGC termination insurance, must have properly elected before September 27, 1981, not to be treated as a multiemployer plan under Code section 414(f)(5) or ERISA sections 3(37)(E) and 4001(a)(3), and have not revoked that election or made an election to be treated as a multiemployer plan under Code section 414(f)(6) or ERISA section 3(37)(G). A single [Insert either Form 5500 or Form 5500–SF] Annual Return/Report is filed for the multiple-employer plan; participating employers do not file individually for this type of plan. [Following sentence is for Form 5500 Instructions only] A pooled employer plan as defined in ERISA section 3(44) operated by a ''pooled plan provider'' that meets the definition under ERISA section 3(43) is a multiple-employer plan.[21]

Note. Do not check this box if all of the employers maintaining the plan are members of the same controlled group or affiliated service group under Code sections 414(b), (c), or (m).

Participating Employer Information. [Insert for Form 5500 ''Except as provided below, multiple-employer pension plans and multiple-employer welfare plans required to file a Form 5500'' or Insert for Form 5500–SF ''Eligible multiple-employer pension plans that file a Form 5500–SF''] must include an attachment using the format below. The attachment must be properly identified at the top with the label ''Multiple-Employer Plan Participating Employer Information,'' and the name of the plan, EIN, and plan number (PN) as found on the plan's [Insert Form 5500 or Form 5500–SF]. Complete as many entries as needed to report the required information for all participating employers in the plan.

- All multiple-employer pension plans must complete elements 1–3 of the ''Multiple-Employer Plan Participating Employer Information'' attachment. For element 3, enter a good faith estimate of each employer's percentage of the total contributions (including employer and participant contributions) made by all participating employers during the year. The percentage may be rounded to be nearest whole percentage. To the extent the rounding results in the total reported percentage being either slightly above or slightly below 100 percent, the filer can indicate that on the attachment. Any employer who was obligated to make contributions to the plan for the plan year, made contributions to the plan for the plan year, or whose employees were covered under the plan is a ''participating employer'' for this purpose. If a participating employer made no contributions, enter ''–0–'' in element 3.
- Multiple-employer pension plans that are defined contribution plans must also complete element 4 of the ''Multiple-Employer Plan Participating Employer Information'' attachment to report the aggregate account balances for each participating employer determined as the sum of the account balances of the employees of such employer (and the beneficiaries of such employees). For element 4, the aggregate account balance attributable to each employer is the sum of the account balances of the employees of such employer and their beneficiaries at the end of the year. Consistent with the information on the schedules of assets for the plan as a whole, use the end of year valuation to calculate the amount of assets by employer. The amounts can be rounded to the nearest dollar, consistent with other asset reporting on the forms and schedules.
- [For Form 5500 Instructions Only] Multiple-employer welfare plans that are unfunded, fully insured, or a combination of unfunded/insured and exempt under 29 CFR 2520.104–44 from the obligation to file financial statements with their annual report are required to complete elements 1 and 2 only of the ''Multiple-Employer Plan Participating Employer Information'' attachment.[22]
- [For Form 5500 Instructions Only] Multiple-employer pension plans that are pooled employer plans must also complete the ''Pooled Employer Plan Information'' attachment. The attachment may be attached as part of the ''Multiple-Employer Plan Participating Employer Information'' attachment or as a separate attachment entitled ''Pooled Employer Plan Information.'' For element 1b, AckID is the acknowledgement code generated by the system in response to a completed Form PR submitted. The instructions to the Form PR advise the pooled plan provider that it must keep, under ERISA section 107, the electronic receipt for the Form PR filing as part of the records of the pooled employer plans operated by the pooled plan provider.[23]

[21] Pooled employer plans are not eligible to file the Form 5500–SF so the instructions describing the pooled employer plan's status as a MEP are not being added to the Form 5500–SF instructions.

[22] This paragraph only applies to multiple employer welfare plans that file the Form 5500, and thus is not needed in the Form 5500–SF instructions.

[23] As noted above, because pooled employer plans are not eligible to file the Form 5500–SF, this language describing the pooled employer plan attachment is only being added to the Form 5500 instructions.

Multiple-Employer Plan Participating Employer Information
(Insert Name of Plan and EIN/PN as shown on the [Insert Form 5500 or Form 5500-SF as applicable])

1. Name of participating employer	**2.** EIN	**3.** Percent of Total Contributions for Plan Year	**4.** Aggregate Account Balances at End of Year Attributable to Participating Employer
1. Name of participating employer	**2.** EIN	**3.** Percent of Total Contributions for Plan Year	**4.** Aggregate Account Balances at End of Year Attributable to Participating Employer
1. Name of participating employer	**2.** EIN	**3.** Percent of Total Contributions for Plan Year	**4.** Aggregate Account Balances at End of Year Attributable to Participating Employer
1. Name of participating employer	**2.** EIN	**3.** Percent of Total Contributions for the Plan Year	**4.** Aggregate Account Balances at End of Year Attributable to Participating Employer
1. Name of participating employer	**2.** EIN	**3.** Percent of Total Contributions for the Plan Year	**4.** Aggregate Account Balances at End of Year Attributable to Participating Employer

Complete as many rows as needed to report the required information for all participating employers in the plan.

[For Form 5500 Instructions only]
Pooled Employer Plan/Pooled Plan Provider Information
(Insert Name of Plan and EIN/PN as shown on the Form 5500)

Only pooled employer plans complete.

1a. Is the pooled plan provider currently in compliance with the requirements for filing the Form PR (Pooled Plan Provider Registration Statement)? (See Form PR Instructions and 29 CFR 2510.3-44.) [] Yes [] No

1b. If "**Yes**" is checked in line 1a, enter the AckID for the most recent Form PR that was required to be filed under the Form PR filing requirements. (Failure to enter a valid AckID will subject the Form 5500 filing subject to rejection as incomplete.)

AckID _____

The following revisions are being made to the Form 5500–SF instructions:

- In the first paragraph of the ''General Instruction'' section, add a seventh bulleted paragraph that reads ''Not be a pooled employer plan. See ERISA section 3(43).''
- In the ''General Instruction'' section, under the heading ''Who May File Form 5500–SF,'' add a new paragraph number 7 before the Note that reads: ''7. The plan is not a pooled employer plan. See ERISA section 3(43).''
- In the ''Specific Line-By-Line Instructions (Form 5500–SF)'' in instructions for Part II, Line 6, add a new paragraph number 7 that reads: ''7. The plan is not a pooled employer plan. See ERISA section 3(43).''

Statutory Authority

Accordingly, pursuant to the authority in sections 101, 103, 104, 109, 110, the Form 5500 Annual Return/Report and the Form 5500–SF Short Form Annual Return/Report are amended as set forth herein.

Signed at Washington, DC, this 17th day of December, 2021.

Ali Khawar,

Acting Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. 2021–27764 Filed 12–28–21; 8:45 am]

BILLING CODE 4510–29–C

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 1

[Docket No. PTO–P–2020–0032]

RIN 0651–AD48

Electronic Submission of a Sequence Listing, a Large Table, or a Computer Program Listing Appendix in Patent Applications

AGENCY: United States Patent and Trademark Office, Department of Commerce.

ACTION: Final rule; correction.

SUMMARY: The United States Patent and Trademark Office (USPTO or Office) makes corrections to a final rule published on October 14, 2021, that amended the rules of practice to permit higher-capacity physical media to be submitted to the USPTO. This rule fixes typographical errors.

DATES: This rule is effective on December 29, 2021.

FOR FURTHER INFORMATION CONTACT: Mary C. Till, Senior Legal Advisor, Office of Patent Legal Administration, Office of the Deputy Commissioner for Patents, at *Mary.Till@uspto.gov*; or Ali Salimi, Senior Legal Advisor, Office of Patent Legal Administration, Office of the Deputy Commissioner for Patents, at *Ali.Salimi@uspto.gov.*

SUPPLEMENTARY INFORMATION: On October 14, 2021, the USPTO published a final rule amending the rules of practice to permit higher-capacity physical media to be submitted to the USPTO (86 FR 57035). That final rule, which went into effect on November 15, 2021, contained two incorrect cross-references in 37 CFR 1.77 to the methods by which a sequence listing may be submitted to the USPTO. This final rule corrects those cross-references to avoid any confusion.

Section 1.77(b)(13) is revised to reference § 1.821(c)(2) for a ''Sequence Listing'' that is submitted as a Portable Document Format (PDF) file via the USPTO patent electronic filing system and § 1.821(c)(3) for a ''Sequence Listing'' that is submitted on physical sheets of paper. The references published in the October 14, 2021, final rule—§ 1.821(c)(1)(ii) and § 1.821(c)(1)(iii)—do not exist.

Rulemaking Considerations

A. Administrative Procedure Act

This rulemaking corrects typographical errors in a rulemaking permitting higher-capacity physical media to be submitted to the USPTO. The changes in this rulemaking involve a rule of agency practice and procedure and/or an interpretive rule. *See Perez* v. *Mortg. Bankers Ass'n,* 135 S. Ct. 1199, 1204 (2015) (Interpretive rules ''advise the public of the agency's construction of the statutes and rules which it administers.'' (citation and internal quotation marks omitted)); *Nat'l Org. of Veterans' Advocates* v. *Sec'y of Veterans Affairs,* 260 F.3d 1365, 1375 (Fed. Cir. 2001) (rule that clarifies interpretation of a statute is interpretive); *Bachow Commc'ns Inc.* v. *FCC,* 237 F.3d 683, 690 (D.C. Cir. 2001) (Rules governing an application process are procedural under the Administrative Procedure Act.); *Inova Alexandria Hosp.* v. *Shalala,* 244 F.3d 342, 350 (4th Cir. 2001) (Rules for handling appeals were procedural where they did not change the substantive standard for reviewing claims.).

Accordingly, prior notice and opportunity for public comment for the changes in this rulemaking are not required pursuant to 5 U.S.C. 553(b) or (c), or any other law. *See Perez,* 135 S. Ct. at 1206 (Notice and comment procedures are required neither when an agency ''issue[s] an initial interpretive rule'' nor ''when it amends or repeals that interpretive rule.''); *Cooper Techs. Co.* v. *Dudas,* 536 F.3d 1330, 1336–37 (Fed. Cir. 2008) (stating that 5 U.S.C. 553, and thus 35 U.S.C. 2(b)(2)(B), do not require notice and comment rulemaking for ''interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice'' (quoting 5 U.S.C. 553(b)(A))).

In addition, the Director of the USPTO finds good cause under 5 U.S.C. 553(b)(B) to waive the notice and comment requirements of the Administrative Procedure Act. As discussed above, the changes in this rulemaking involve correcting typographical errors in two cross-references in the final rule published on October 14, 2021. These changes are administrative in nature and will have no substantive impact on the evaluation of a patent application. If this rule were delayed to allow for notice and comment, this would lead to confusion as to the sections intended to be cross-referenced.

The Director of the USPTO also finds good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effectiveness. As discussed above, the changes in this rulemaking involve correcting typographical errors in two cross-references in the final rule published on October 14, 2021. These changes are administrative in nature and will have no substantive impact on the evaluation of a patent application. The purpose of a delay in effectiveness is to allow affected parties time to modify their behaviors, businesses, or practices to come into compliance with new regulations. This rule imposes no additional requirements on the affected entities. Therefore, the requirement for a 30-day delay in effectiveness is not applicable, and the rule is made effective immediately upon publication.

B. Regulatory Flexibility Act

As prior notice and an opportunity for public comment are not required pursuant to 5 U.S.C. 553 or any other law, neither a Regulatory Flexibility Act analysis nor a certification under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) is required. *See* 5 U.S.C. 603.

C. Executive Order 12866 (Regulatory Planning and Review)

This rulemaking has been determined to be not significant for purposes of Executive Order 12866 (Sept. 30, 1993).

D. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the USPTO consider the impact of paperwork and other information collection burdens imposed on the public. The USPTO has determined that there are no new requirements for information collection associated with this final rule.

List of Subjects in 37 CFR Part 1

Administrative practice and procedure, Biologics, Courts, Freedom of information, Inventions and patents, Reporting and recordkeeping requirements, Small businesses.

For the reasons stated in the preamble and under the authority contained in 35 U.S.C. 2, as amended, the USPTO amends 37 CFR part 1 as follows:

PART 1—RULES OF PRACTICE IN PATENT CASES

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

Authority: 35 U.S.C. 2(b)(2), unless otherwise noted.

■ 2. Amend § 1.77 by revising paragraph (b)(13) to read as follows:

§ 1.77 Arrangement of application elements.

* * * * *

(b) * * *

(13) ''Sequence Listing,'' required by § 1.821(c), that is submitted as a Portable Document Format (PDF) file (as set forth in § 1.821(c)(2)) via the USPTO patent electronic filing system or on

physical sheets of paper (as set forth in § 1.821(c)(3)).

* * * * *

Andrew Hirshfeld,

Commissioner for Patents, Performing the Functions and Duties of the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2021–28128 Filed 12–28–21; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 513

[CMS–5528–F]

RIN 0938–AT91

Most Favored Nation (MFN) Model

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

ACTION: Final rule.

SUMMARY: This final rule rescinds the Most Favored Nation Model interim final rule with comment period that appeared in the November 27, 2020, **Federal Register**.

DATES: This final rule is effective February 28, 2022.

FOR FURTHER INFORMATION CONTACT: Lara Strawbridge, (410) 786–7400 or *MFN@cms.hhs.gov*.

I. Background

In the August 10, 2021 **Federal Register** (86 FR 43620), we published a proposed rule (86 FR 43618, hereafter, referred to as ''the August 2021 proposed rule'') that would rescind the Most Favored Nation (MFN) Model interim final rule with comment period (85 FR 76180) that appeared in the November 27, 2020 **Federal Register** (hereafter, referred to as ''the November 2020 MFN Model interim final rule''). The November 2020 MFN Model interim final rule established a 7-year nationwide, mandatory MFN Model to test an alternative way for Medicare to pay for certain Medicare Part B single source drugs and biologicals (including biosimilar biologicals), under section 1115A of the Social Security Act (the Act), with the model performance period beginning on January 1, 2021. The MFN Model was not implemented on January 1, 2021 as contemplated following four lawsuits and a nationwide preliminary injunction. On December 28, 2020, the U.S. District Court for the Northern District of California issued a nationwide preliminary injunction in *California Life Sciences Ass'n* v. *CMS,* No. 3:20–cv–08603, which preliminarily enjoined HHS from implementing the MFN Model and the November 2020 interim final rule. For additional information on the MFN Model and the related lawsuits, see the August 2021 proposed rule, the November 2020 MFN Model interim final rule, and the MFN Model website.[1]

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

Given that the nationwide preliminary injunction precluded implementation of the MFN Model on January 1, 2021, as contemplated, that multiple courts found procedural issues with the November 2020 interim final rule, and that stakeholders expressed concern about the model start date,[2] in the August 2021 proposed rule (86 FR 43620), we proposed to rescind the November 2020 MFN Model interim final rule and remove the regulations at 42 CFR part 513 (these actions would withdraw the MFN Model), and invited comments on our proposal. We received 34 timely items of correspondence from health care providers (such as health systems, hospitals, physician practices, and infusion centers), physician specialty groups, drug manufacturers, pharmaceutical industry groups, pharmacy benefit managers, patient advocacy groups, and individuals.

The following is a summary of the public comments received as well as our responses.

Comment: In general, the comments on the August 2021 proposed rule closely aligned with the comments we received in response to the November 2020 MFN Model interim final rule. Several commenters expressed general support for lowering drug prices. However, all but one of the commenters supported our proposal to rescind the November 2020 MFN Model interim final rule and remove the associated regulatory text at 42 CFR part 513. A commenter supported advancing the MFN Model, stating that the model ''is a guarantee to every American that we are not overpaying for the life sustaining medications they need. . . . [G]ive Americans the same drugs for the same price as the rest of the world.'' Several commenters urged us not to implement the MFN Model or similar models, such as any model that would test international or domestic reference pricing now or in the future. Many commenters expressed concerns about the potential for beneficiaries to lose access to drugs included in the MFN Model if manufacturers did not lower prices to align with the model payment amount, the potential for an MFN Model start to exacerbate practice struggles during the COVID–19 pandemic, and the potential financial hardship and administrative burden that hospitals, physician practices, and 340B covered entities may experience related to the MFN Model. Some commenters described legal concerns that were raised in the model-related lawsuits.

Response: We appreciate commenters' support for our proposal to rescind the November 2020 MFN Model interim final rule and remove the associated regulatory text at 42 CFR part 513 (these actions would withdraw the MFN Model). We appreciate the commenter's concern that Americans are paying more for drugs than consumers in other countries pay, although we disagree with the commenter that the MFN Model would guarantee that Americans would pay the exact amount that others pay for drugs, as the MFN Model was designed as a 7-year model test that would phase in the MFN Price over time, and further, there is no one international price that others outside the United States pay. We will continue to carefully consider this commenter's feedback and other stakeholders' feedback that we received as we explore all options to incorporate value into payments for Medicare Part B drugs, improve beneficiaries' access to evidence-based care, and reduce drug spending for consumers and throughout the health care system. As stated in the Department of Health and Human Services' (HHS') Comprehensive Plan for Addressing High Drug Prices: A Report in Response to the Executive Order on Competition in the American Economy (September 9, 2021), there are many administrative tools that could be used to promote competition and reduce drug pricing, including testing models in Medicare Part B using value-based payments, in which payment for drugs

[1] See the MFN Model website at *https://innovation.cms.gov/innovation-models/most-favored-nation-model*.

[2] For example, in response to the November 2020 interim final rule, commenters stated that the MFN Model should not start during the COVID–19 pandemic, and in addition that the model should not begin on January 1, 2021, while the public comment period for the November 2020 interim final rule was ongoing (until January 26, 2021). Further, commenters stated that CMS failed to allow MFN participants sufficient time to prepare for model start and to develop and deploy new systems with distributors and customers to exclude model sales from average sales price (ASP) reporting.

is directly linked to the clinical value they provide patients.[3]

Comment: Some commenters offered views on potential policies and alternative payment models that HHS and CMS could consider.

Response: We thank stakeholders for their comments. These topics are outside the scope of this rule, but we may consider the comments in the future.

Final Decision: After considering the comments on our proposal, we are finalizing our proposal as proposed. In this final rule, we rescind the November 2020 MFN Model interim final rule and remove the associated regulatory text at 42 CFR part 513. Thus, as a result of this final rule, the MFN Model is withdrawn, effective on the date specified in the **DATES** section of this final rule.

III. Collection of Information Requirements

As stated in section 1115A(d)(3) of the Act, Chapter 35 of title 44, United States Code shall not apply to the testing and evaluation of CMS Innovation Center Models. However, costs incurred through information collections were described in sections III.H., III.I.b., and VI.C.5. of the November 2020 MFN Model interim final rule (85 FR 76221, 76222, and 76244, respectively). We are finalizing the provisions of the August 2021 proposed rule, which proposed to rescind requirements related to the information collection described in the November 2020 MFN Model interim final rule. As such, the estimate of the impact of this final rule in section IV.C. of this final rule includes the savings from rescinding the information collection requirements in the November 2020 MFN Model interim final rule. Further, the August 2021 proposed rule and this final rule do not impose information collection requirements, that is, reporting, recordkeeping, or third-party disclosure requirements. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

We did not receive comments on the discussion of information collection in the proposed rule.

IV. Regulatory Impact Analysis

A. Statement of Need

The purpose of this final rule is to finalize the rescission of the Most Favored Nation Model interim final rule with comment period that appeared in the November 27, 2020 **Federal Register**, and remove the associated regulatory text at 42 CFR part 513 (these actions will withdraw the MFN Model).

B. Overall Impact

We have examined the impact of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule: (1) Having an annual effect on the economy of $100 million or more in any one year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Based on our estimates, OMB's Office of Information and Regulatory Affairs has determined this rulemaking is ''economically significant'' as measured by the $100 million threshold, and hence also a major rule under Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (also known as the Congressional Review Act). Accordingly, we have prepared a regulatory impact analysis that to the best of our ability presents the costs and benefits of the rulemaking.

C. Detailed Economic Analysis

Removing the regulatory text at 42 CFR part 513, which withdraws the MFN Model, prevents realization of the annualized/monetized estimates of costs and transfers presented in the November 2020 MFN Model interim final rule (85 FR 76235 through 76248). The RIA of the November 2020 MFN Model interim final rule estimated that the MFN Model would result in substantial overall savings for the Medicare program, the Medicaid program, and beneficiaries, and that model participants would experience costs associated with complying with the regulations, survey completion, and potential requests for a financial hardship exemption.

In the November 2020 MFN Model interim final rule, we presented estimates from the CMS Office of the Actuary (OACT) (85 FR 76236) and the HHS Office of the Assistant Secretary for Planning and Evaluation (ASPE) (85 FR 76240). We noted that there is much uncertainty around the assumptions for both the OACT and ASPE estimates, and refer readers to section VI.C. of the November 2020 MFN Model interim final rule for a more complete discussion of the estimated impacts of the MFN Model. These potential impacts were estimated to occur beginning January 2021 through December 2028, in alignment with a January 1, 2021 model start. However, because the MFN Model was not implemented on January 1, 2021, as contemplated in the November 2020 MFN Model interim final rule, such effects have not occurred.

[3] *https://aspe.hhs.gov/sites/default/files/2021-09/Drug_Pricing_Plan_9-9-2021.pdf.*

Nevertheless and notwithstanding the nationwide preliminary injunction, this analysis uses a baseline in which the November 2020 MFN Model interim final rule was implemented on January 1, 2021, to calculate the monetized estimates of the effects of this final rule. We maintain the analytical approach described in the RIA of the November 2020 MFN Model interim final rule and August 2021 proposed rule, and for the purpose of quantifying the effects of this final rule, assume that the regulations added by the November 2020 MFN Model interim final rule would remain in full effect if this final rule was not finalized. By rescinding the regulations added by the November 2020 MFN Model interim final rule, this final rule prevents the occurrence of the estimated costs and transfers presented in the November 2020 MFN Model interim final rule. As presented in the August 2021 proposed rule (86 FR 43621), we summarize this result in Tables 1 and 2, which illustrate, inversely, the monetized estimates contained in Table 17 (85 FR 76247) and Table 18 (85 FR 76248) of the November 2020 MFN Model interim final rule. The period covered shown in Tables 1 and 2 begins January 2021 in alignment with the accounting statements and tables presented in the November 2020 MFN Model interim final rule and in the August 2021 proposed rule. This approach illustrates that this final rule prevents the realization of the annualized/monetized estimates of costs and transfers that were presented in the November 2020 MFN Model interim final rule. Because the MFN Model was not implemented, readers should understand that this final rule does not affect conditions in the past.

TABLE 1—ACCOUNTING STATEMENT: ESTIMATED IMPACTS FROM CY 2021 TO CY 2028 AS A RESULT OF PROVISIONS OF THIS FINAL RULE BASED ON THE OACT ESTIMATE

Category	Estimates	Units		
		Year dollar	Discount rate (%)	Period covered
Costs:				
Annualized Monetized ($million/year)	−29.4	2018	7	January 2021–December 2028.
	−27.1	2018	3	January 2021–December 2028.
To Whom	Hospital/physicians.			
Annualized Monetized ($million/year)	−0.4	2018	7	January 2021–December 2027.
	−0.4	2018	3	January 2021–December 2027.
Transfers:				
Annualized Monetized ($million/year)	11,502.5	2018	7	January 2021–December 2027.
	11,906.3	2018	3	January 2021–December 2027.
From Whom to Whom	Federal Government to hospitals/physicians and MA plans.			
Annualized Monetized ($million/year)	4,087.2	2018	7	January 2021–December 2027.
	4,228.3	2018	3	January 2021–December 2027.
From Whom to Whom	Beneficiaries to hospitals/physicians and MA plans.			
Annualized Monetized ($million/year)	577.5	2018	7	January 2021–December 2027.
	596.5	2018	3	January 2021–December 2027.
From Whom to Whom	States to hospitals/physicians and MA plans			

TABLE 2—ACCOUNTING STATEMENT: ESTIMATED IMPACTS FROM CY 2021 TO CY 2028 AS A RESULT OF THE PROVISIONS OF THIS FINAL RULE BASED ON THE ASPE ESTIMATE

Category	Estimates	Units		
		Year dollar	Discount rate (%)	Period covered
Costs:				
Annualized Monetized ($million/year)	−29.4	2018	7	January 2021–December 2028.
	−27.1	2018	3	January 2021–December 2028.
To Whom	Hospital/physicians.			
Annualized Monetized ($million/year)	−0.4	2018	7	January 2021–December 2027.
	−0.4	2018	3	January 2021–December 2027.
Transfers:				
Annualized Monetized ($million/year)	7,058.3	2018	7	January 2021–December 2027.
	7,276.5	2018	3	January 2021–December 2027.
From Whom to Whom	Federal Government to hospitals/physicians and MA plans.			

TABLE 2—ACCOUNTING STATEMENT: ESTIMATED IMPACTS FROM CY 2021 TO CY 2028 AS A RESULT OF THE PROVISIONS OF THIS FINAL RULE BASED ON THE ASPE ESTIMATE—Continued

Category	Estimates	Units		
		Year dollar	Discount rate (%)	Period covered
Annualized Monetized ($million/year)	4,504.9	2018	7	January 2021–December 2027.
	4,638.6	2018	3	January 2021–December 2027.
From Whom to Whom	Beneficiaries to hospitals/physicians and MA plans.			
Annualized Monetized ($million/year)	342.4	2018	7	January 2021–December 2027.
	351.6	2018	3	January 2021–December 2027.
From Whom to Whom	States to hospitals/physicians and MA plans.			

Comment: A few commenters stated that, based on their own or others' analyses, the OACT and ASPE estimates shown in the November 2020 MFN Model interim final rule underestimate the negative financial impact that certain healthcare providers would likely experience had the MFN Model been implemented. Many commenters expressed concern that some of the estimated savings would be related to reduced access to care. We did not receive comments on our approach to illustrate, inversely, the monetized estimates contained in Table 17 (85 FR 76247) and Table 18 (85 FR 76248) of the November 2020 MFN Model interim final rule in Table 1 and Table 2 of the August 2021 proposed rule, respectively.

Response: We thank stakeholders for their comments. As we noted in the November 2020 MFN Model interim final rule and the August 2021 proposed rule, there is much uncertainty around the assumptions for both the OACT and ASPE estimates that were presented in those rules.

Final Decision: After considering the comments on the RIA of our proposal, and because we are finalizing our proposal as proposed, we are finalizing the RIA without change; that is, as presented in the August 2021 proposed rule.

D. Regulatory Flexibility Act (RFA)

The RFA requires agencies to analyze options for regulatory relief of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of less than $8 million to $41.5 million in any 1 year. Individuals and States are not included in the definition of a small entity. For details, see the Small Business Administration's ''Table of Small Business Size Standards'' at *https://www.sba.gov/document/support-table-size-standards*. The rule of thumb used by HHS for determining whether an impact is ''significant'' is an adverse effect equal to 3 percent or more of total annual revenues.

This final rule affects the vast majority of Medicare-participating providers and suppliers that submit claims for separately payable Medicare Part B drugs by preventing the impacts described in the November 2020 MFN Model interim final rule (85 FR 76246) from being realized. Over 20,000 small entities would have been included or affected by the MFN Model if the model had been implemented. We refer readers to Table 3 and Table 8 in the November 2020 MFN Model interim final rule (85 FR 76195 and 76219, respectively) to see the number of entities, as well as the types of providers and suppliers, that most likely would have been impacted by the MFN Model had it been implemented. This final rule withdraws the MFN Model, and therefore likely impacts these same entities. Accordingly, we have determined that a Regulatory Flexibility Analysis is required. As its measure of significant economic impact on a substantial number of small entities, HHS uses a change in revenue of more than 3 to 5 percent. We believe that this threshold will be reached by the requirements in this final rule. Therefore, the Secretary has certified that the August 2021 proposed rule and this final rule will have a significant economic impact on a substantial number of small entities. The Regulatory Flexibility Analysis presented in the November 2020 MFN Model interim final rule (85 FR 76245) describes the potential impact of the MFN Model, if it had been implemented, on small entities. This final rule prevents those impacts from being realized. Specifically, the lower drug payments and alternative add-on payments described in section III.F. of the November 2020 MFN Model interim final rule will not occur. Instead, payment for submitted claims will be made under the applicable Medicare payment methodology. This Regulatory Flexibility Analysis, together with the preamble, constitutes the required analysis.

In addition, section 1102(b) of the Act requires us to prepare an RIA if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area for Medicare payment regulations and has fewer than 100 beds. We estimate that this final rule will have a significant impact on small rural hospitals by preventing the impacts described in the November 2020 MFN Model interim final rule (85 FR 76246) from being realized. Specifically, these rural entities will not experience drug payment reductions and overall payment reductions. Instead, payment for submitted claims will be made under the applicable Medicare payment methodology. We estimate that this final rule will have a parallel significant impact on urban entities.

We welcomed comments on our estimate of significantly affected providers and suppliers and the magnitude of estimated effects for the proposed rule.

Comment: Several commenters stated that our estimate of significantly affected providers and suppliers and the magnitude of estimated effects presented in the November 2020 MFN Model interim final rule underestimated the potential financial losses and operational impacts that health care

providers, such as hospitals, physicians and infusion centers, would have experienced had the MFN Model been implemented as contemplated.

Response: We thank stakeholders for their comments. As we noted in the November 2020 MFN Model interim final rule and the August 2021 proposed rule, there is much uncertainty around the assumptions for both the OACT and ASPE estimates that were presented in those rules.

Final Decision: After considering the comments on the estimate of significantly affected providers and suppliers and the magnitude of estimated effects of our proposal, and because we are finalizing our proposal as proposed, we maintain our analysis, as presented in the August 2021 proposed rule, for this final rule.

E. Unfunded Mandates Reform Act (UMRA)

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2021, that threshold is approximately $158 million. As discussed in section V.C. of the August 2021 proposed rule and section IV.C. of this final rule, the financial impacts for States (that is, an estimated overall reduction in State spending) presented in the November 2020 MFN Model interim final rule (85 FR 76235 through 76248) will not be realized. The August 2021 proposed rule and this final rule did not mandate any spending by State, local, or tribal governments, or by the private sector, and hence an UMRA analysis is not required.

F. Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. As discussed in section V.C. of the August 2021 proposed rule and section IV.C. of this final rule, the financial impacts for States (that is, an estimated overall reduction in State spending) presented in the November 2020 MFN Model interim final rule (85 FR 76235 through 76248) will not be realized. Since this rule does not impose any costs on State or local governments, preempt State law, or otherwise have Federalism implications, the requirements of Executive Order 13132 are not applicable.

In accordance with the provisions of Executive Order 12866, this final rule was reviewed by the Office of Management and Budget.

Chiquita Brooks-LaSure, Administrator of the Centers for Medicare & Medicaid Services, approved this document on December 14, 2021.

List of Subjects for 42 CFR 513

Administrative practice and procedure, Health facilities, Medicare, Reporting and recordkeeping requirements.

PART 513—[REMOVED]

■ For the reasons set forth in the preamble and under the authority at 5 U.S.C. 301, the Centers for Medicare & Medicaid Services removes 42 CFR part 513.

Dated: December 21, 2021.

Xavier Becerra,

Secretary, Department of Health and Human Services.

[FR Doc. 2021–28225 Filed 12–27–21; 4:15 pm]

BILLING CODE 4120–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 665

[Docket No. 211221–0265]

RTID 0648–XP016

Pacific Island Pelagic Fisheries; 2022 U.S. Territorial Longline Bigeye Tuna Catch Limits

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final specifications.

SUMMARY: NMFS specifies a 2022 limit of 2,000 metric tons (t) of longline-caught bigeye tuna for each U.S. Pacific territory (American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands (CNMI), the territories). NMFS will allow each territory to allocate up to 1,500 t in 2022 to U.S. longline fishing vessels through specified fishing agreements that meet established criteria. The overall allocation limit among all territories, however, may not exceed 3,000 t. As an accountability measure, NMFS will monitor, attribute, and restrict (if necessary) catches of longline-caught bigeye tuna, including catches made under a specified fishing agreement. These catch limits and accountability measures support the long-term sustainability of fishery resources of the U.S. Pacific Islands.

DATES: The final specifications are effective January 28, 2022, through December 31, 2022. The deadline to submit a specified fishing agreement pursuant to 50 CFR 665.819(b)(3) for review is June 27, 2022.

ADDRESSES: Copies of the Fishery Ecosystem Plan for Pelagic Fisheries of the Western Pacific (FEP) are available from the Western Pacific Fishery Management Council (Council), 1164 Bishop St., Suite 1400, Honolulu, HI 96813, tel 808–522–8220, or *www.wpcouncil.org.*

Pursuant to the National Environmental Policy Act, the Council and NMFS prepared environmental analyses that support this action and are available at *https://www.regulations.gov/docket/NOAA-NMFS-2021-0076.*

FOR FURTHER INFORMATION CONTACT: Lynn Rassel, NMFS PIRO Sustainable Fisheries, 808–725–5184.

SUPPLEMENTARY INFORMATION: NMFS is specifying a 2022 catch limit of 2,000 t of longline-caught bigeye tuna for each U.S. Pacific territory. NMFS is also authorizing each territory to allocate up to 1,500 t of its 2,000 t bigeye tuna limit, not to exceed a 3,000 t total annual allocation limit among all the territories, to U.S. longline fishing vessels permitted to fish under the FEP. A specified fishing agreement with the applicable territory must identify those vessels.

NMFS will monitor catches of longline-caught bigeye tuna by the longline fisheries of each U.S Pacific territory, including catches made by U.S. longline vessels operating under specified fishing agreements. The criteria that a specified fishing agreement must meet, and the process for attributing longline-caught bigeye tuna, will follow the procedures in 50 CFR 665.819. When NMFS projects that the fishery will reach a territorial catch or allocation limit, NMFS will, as an accountability measure, prohibit the catch and retention of longline-caught bigeye tuna by vessels in the applicable territory (if the territorial catch limit is projected to be reached), and/or vessels in a specified fishing agreement (if the allocation limit is projected to be reached).

You may find additional background information on this action in the preamble to the proposed specifications published on October 27, 2021 (86 FR

59357). Regardless of the final specifications, all other existing management measures will continue to apply in the longline fishery.

Comments and Responses

On October 27, 2021, NMFS published the proposed specifications and request for public comments (86 FR 59357); the comment period closed on November 12, 2021. NMFS received comments from two sources who generally supported the proposed action. A third commenter expressed concern about the status of bigeye tuna, and we respond below.

Comment: Overfishing mature bigeye tuna reduces the stock and prevents stock growth, longline fishing is directed at adult tuna capable of reproducing, and reducing catch limits will help to improve this species' stock and prevent them from being overfished.

Response: There are two stocks of Pacific bigeye tuna: The Western and Central Pacific stock and the Eastern Pacific stock. According to the most recent stock assessments, neither stock is overfished or subject to overfishing. In developing the territorial bigeye tuna catch allocation limits, NMFS and the Council considered a range of catch and allocation limits, taking into consideration sustainability of the stock, decisions of regional fishery management organizations, and the needs of Pacific Island fishing communities. The 2022 allocation limits allow for the sustainability of the bigeye tuna stock and are consistent with the FEP, the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), and other applicable laws.

Classification

Pursuant to section 304(b)(3) of the Magnuson-Stevens Act, the NMFS Assistant Administrator (AA) has determined that this final rule is consistent with the FEP, other provisions of the Magnuson-Stevens Act, and other applicable laws.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that the proposed specifications would not have a significant economic impact on a substantial number of small entities. NMFS published the factual basis for the certification in the proposed specifications, and we do not repeat it here. NMFS received no comments relevant to this certification; as a result, a final regulatory flexibility analysis is not required, and none has been prepared.

This action is exempt from review under Executive Order 12866.

This document contains no information collection requirements under the Paperwork Reduction Act of 1995.

Authority: 16 U.S.C. 1801, *et seq.*

Dated: December 21, 2021.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2021–28107 Filed 12–28–21; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register

Vol. 86, No. 247

Wednesday, December 29, 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 ENERGY

10 CFR Part 474

[EERE–2021–VT–0033]

Petroleum Equivalence Factor, Notification of Petition for Rulemaking

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

ACTION: Notification of petition for rulemaking; request for comments.

SUMMARY: This document announces receipt of a petition for rulemaking received by the Department of Energy (DOE) on October 22, 2021, from the Natural Resources Defense Council (NRDC) and Sierra Club requesting that DOE update its regulations concerning procedures for calculating a value for the petroleum-equivalent fuel economy of electric vehicles (EVs) for use in the Corporate Average Fuel Economy (CAFE) program administered by the Department of Transportation (DOT). This document summarizes the substantive aspects of this petition and requests public comments on the merits of the petition.

DATES: DOE will accept comments, data, and information with respect to the NRDC and Sierra Club Petition until February 28, 2022.

ADDRESSES: You may submit comments, identified by docket number ''EERE–2021–VT–0033,'' by the following method:

Federal eRulemaking Portal: www.regulations.gov. Follow the instructions for submitting comments.

Email: PEFPetition2021VT0033@ee.doe.gov. Include the docket number and/or RIN in the subject line of the message.

Although DOE has routinely accepted public comment submissions through a variety of mechanisms, including the Federal eRulemaking Portal, postal mail and hand delivery/courier, the Department has found it necessary to make temporary modifications to the comment submission process in light of the ongoing coronavirus 2019 (''COVID–19'') pandemic. DOE is currently suspending receipt of public comments via postal mail and hand delivery/courier. If a commenter finds that this change poses an undue hardship, please contact Vehicle Technologies Program staff to discuss the need for alternative arrangements. Once the COVID–19 pandemic health emergency is resolved, DOE anticipates resuming all of its regular options for public comment submission, including postal mail and hand delivery/courier.

Docket: The docket, which includes **Federal Register** notices, comments, and other supporting documents/materials, is available for review at *www.regulations.gov.* All documents in the docket are listed in the *www.regulations.gov* index. However, some documents listed in the index, such as those containing information that is exempt from public disclosure, may not be publicly available.

The docket web page can be found at: *www.regulations.gov/docket/EERE-2021-VT-0033.*

The docket web page will contain simple instructions on how to access all documents, including public comments, in the docket.

FOR FURTHER INFORMATION CONTACT: Mr. Kevin Stork, U.S. Department of Energy, Vehicle Technologies Program, EE–3V, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 586–8306. Email: *Kevin.Stork@ee.doe.gov.*

Mr. Peter Cochran, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585–0103. Telephone: (202) 586–9496. Email: *Peter.Cochran@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: The Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.,* provides, among other things, that ''[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.'' (5 U.S.C. 553(e)) DOE received a petition for rulemaking from the Natural Resources Defense Council (NRDC) and Sierra Club requesting that DOE update its regulations at 10 CFR part 474 concerning procedures for calculating a value for the petroleum-equivalent fuel economy of electric vehicles (EVs) for use in the Corporate Average Fuel Economy program administered by the Department of Transportation (DOT). DOE last updated the petroleum equivalence factor (PEF) for EVs in 2000. 65 FR 36985 (June 12, 2000)

In their petition, the petitioners propose that DOE should update regulations for calculating the PEF for electric vehicles. Petitioners assert that the data underlying the current regulation are outdated, resulting in higher imputed values of fuel economy for electric vehicles. The petitioners assert that with this higher imputed value, a smaller number of EVs enable fleetwide compliance at lower real-world average fuel economy across an automaker's overall fleet. The petitioners assert that the PEF should be based upon statutory factors at 49 U.S.C 32904, rather than the existing regulatory approach based upon 49 U.S.C. 32905. The petitioners request that DOE review the PEF calculation and approach and work with the National Highway Traffic Safety Administration to ensure PEF regulations support the goals of the CAFE program.

The petition is available in the docket at *www.regulations.gov/docket/EERE-2021-VT-0033.* Through this document, DOE is seeking views on whether it should grant the petition and undertake a rulemaking to update the PEF. By seeking comment on whether to grant this petition, DOE takes no position at this time regarding the merits of the suggested rulemaking or the assertions made by the petitioners.

DOE welcomes comments and views of interested parties on any aspect of the petition for rulemaking and on whether DOE should proceed with the rulemaking.

Submission of Comments

DOE invites all interested parties to submit in writing by the date under the **DATES** heading, comments and information regarding this petition.

Submitting comments via/www.regulations.gov. The *www.regulations.gov* web page will require you to provide your name and contact information prior to submitting comments. Your contact information will be viewable to DOE Vehicles Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed

properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to *www.regulations.gov* information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (CBI)). Comments submitted through *www.regulations.gov* cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through *www.regulations.gov* before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that *www.regulations.gov* provides after you have successfully uploaded your comment.

Submitting comments via email. Comments and documents submitted via email also will be posted to *www.regulations.gov.* If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information in a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide only documents that are: Not secured, written in English, and free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email two well-marked copies: One copy of the document marked ''Confidential'' including all the information believed to be confidential, and one copy of the document marked ''Non-confidential'' with the information believed to be confidential deleted. Submit these documents via email, if feasible. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

DOE considers public participation to be a very important part of its process for considering rulemaking petitions. DOE actively encourages the participation and interaction of the public during the comment period. Interactions with and between members of the public provide a balanced discussion of the issues and assist DOE in determining how to proceed with a petition. Anyone who wishes to be added to DOE mailing list to receive future notices and information about this petition should contact Vehicle Technologies Program staff at *PetroleumEquivalenceFactorQuestions@ee.doe.gov.*

Signing Authority

This document of the Department of Energy was signed on December 16, 2021, by Kelly J. Speakes-Backman, Principal Deputy Assistant Secretary for Energy Efficiency and Renewable 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 December 16, 2021.

Treena V. Garrett,

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

Petition for Rulemaking To Update Department of Energy Regulations at 10 CFR Part 474: Electric and Hybrid Vehicle Research, Development, and Demonstration Program; Petroleum-Equivalent Fuel Economy Calculation Date:

October 22, 2021
Submitted via email

Natural Resources Defense Council and Sierra Club submit the following petition for rulemaking to update Department of Energy regulations at 10 CFR part 474 that contain procedures for calculating a value for the petroleum-equivalent fuel economy of electric vehicles for use in the Department of Transportation's Corporate Average Fuel Economy program, as required by 49 U.S.C. 32904(a)(2). The subject regulations have not been updated in more than twenty years and must be revised to account for the best available current data so as to not undermine the effectiveness of federal fuel economy standards.

Natural Resources Defense Council and Sierra Club submit this petition under 5 U.S.C. 553(e) for the Department of Energy (DOE) to update its regulations at 10 CFR part 474 concerning procedures for calculating a value for the petroleum-equivalent fuel economy of electric vehicles (EVs) for use in the Corporate Average Fuel Economy program administered by the Department of Transportation (DOT).[1] The existing DOE regulations were promulgated via the final rule Electric and Hybrid Vehicle Research, Development, and Demonstration Program; Petroleum-Equivalent Fuel Economy Calculation, 65 FR 36986 (Jun. 12, 2000). As explained below, DOE is required to review these regulations annually and determine appropriate petroleum equivalent fuel economy values for EVs based on enumerated statutory factors. DOE has not revised these regulations in more than twenty

[1] 5 U.S.C. 553(e) provides that ''each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.''

years and the current values are based on outdated data and circumstances. The regulations are also based on an outdated application of the statutory factors, with the result that existing regulations undermine the CAFE program they are supposed to support. DOE should grant this petition and update the regulations.

Background

In 1975, Congress passed the Energy Policy and Conservation Act (EPCA), which required the National Highway Traffic Safety Administration (NHTSA) to set corporate average fuel economy (CAFE) standards for automobiles as part of a suite of measures to reduce energy consumption.[2] Congress also directed the Secretary of Transportation to submit a report with a recommendation on ''whether or not electric vehicles'' should be included in the CAFE program, including ''the manner in which energy requirements of [EVs] may be compared with energy requirements of [internal combustion] vehicles.''[3] That report recommended against making EVs subject to CAFE standards.[4] As to comparing the energy requirements of EVs to internal combustion engine vehicles (ICEVs), the report observed that there were a number of different ways this question could be answered. The agency proposed comparing vehicles ''on the basis of overall energy efficiency from primary source to final utilization in the vehicle,'' but observed that this approach ''will not account for differences in the 'social value' of various primary energy sources'' and that vehicles could also be compared ''on the basis of petroleum consumption,'' which, for EVs, might include petroleum used to generate electricity.[5]

Notwithstanding DOT's recommendations, in 1980 Congress directed DOE ''to conduct a seven-year evaluation program of the inclusion of electric vehicles . . . in the calculation of average fuel economy [in the CAFE program] . . . to determine the value and implications of such inclusion as an incentive for the early initiation of industrial engineering development and initial commercialization of electric vehicles.''[6] DOE was also directed to determine ''equivalent petroleum based fuel economy values for various classes of electric vehicles,'' taking into account:

(i) The approximate electrical energy efficiency of the vehicles considering the vehicle type, mission, and weight;

(ii) the national average electricity generation and transmission efficiencies;

(iii) the need of the Nation to conserve all forms of energy, and the relative scarcity and value to the Nation of all fuel used to generate electricity; and

(iv) the specific driving patterns of electric vehicles as compared with those of petroleum fueled vehicles.[7]

DOE promulgated procedures for calculating EV CAFE values in April 1981.[8] To account for factor 1, the agency chose test procedures to measure the electrical efficiency of an EV.[9] The remaining factors were ostensibly captured as subcomponents of a petroleum-equivalency factor (PEF), which varied annually with changes in the subcomponent terms. The PEF included generation and transmission efficiency terms to account for factor 2.[10] To account for ''the relative value'' of generation fuels required by factor 3, DOE weighted each type of input fuel in the generation efficiency term by the ratio of that fuel's marginal price to the marginal price of gasoline (per Btu).[11] The 1981 rule did not account specifically for ''the need of the Nation to conserve all forms of energy'' or for ''the relative scarcity'' of generation fuels. As to ''the specific driving patterns'' of EVs in factor 4, DOE determined that there was insufficient data available and assigned the driving pattern factor at a unity value of 1.0.[12] The agency also included an accessory factor (AF) that accounted for petroleum-powered accessories (such as cabin heaters) found in some EVs.[13]

In 1987, DOE completed the mandated seven-year evaluation, concluding that the EV CAFE provision was not effective at incentivizing early industrial development or initial commercialization of EVs.[14] The agency noted, however, that there was little apparent downside in having Congress provide for inclusion of EVs in the CAFE program in the future.[15] The calculation of the annual petroleum equivalency factors was not extended past 1987.[16]

Over time, Congress amended various aspects of the statutes governing the CAFE program,[17] and in 1994, codified the program as amended within title 49, United States Code.[18] As then codified, NHTSA was directed to set ''maximum feasible'' average fuel economy standards for each model year.[19] In carrying out that determination, however, NHTSA was prohibited from ''consider[ing] the fuel economy of dedicated automobiles,'' which, as defined, included EVs.[20] But if an automaker in fact produced any EVs, the agency was directed to include in the CAFE compliance calculation equivalent petroleum based fuel economy values determined by [DOE]'' for those EVs.[21] DOE, in turn, was required to ''review those values each year and determine and propose necessary revisions based on'' the four statutory factors listed above.[22]

In February 1994, ''[d]ue to continued technology development and a strong interest in the corporate average fuel economy of electric vehicles from

[2] Public Law 94–163 § 2(5), 89 Stat. 871, 874, 902 (1975). The statute assigns this task to the Secretary of Transportation, who has delegated it to NHTSA. 49 CFR 1.94(c).

[3] Public Law 94–163 § 301.

[4] Department of Transportation, Report, Advisability of Regulating Electric Vehicles for Energy Conservation at S–1 (August 1976). The recommendation stemmed in significant part from a determination that contemporary EVs would have a similar energy efficiency as internal combustion engine vehicles (ICEVs), but that there was less available potential technology to improve EV efficiency compared to the available potential technology to improve ICEV technology. E.g. id. at 3–8. According to the report, regulating EVs under CAFE ''would therefore reduce their already marginal competitiveness.'' Id. at 6–6.

[5] E.g. id. at 6–5 to 6–7.

[6] Chrysler Corporation Loan Guarantee Act of 1979, Public Law 96–185 § 18, 93 Stat. 1324 (Jan 7. 1980). In the late 1970s, one of the leading U.S. automakers, the Chrysler Corporation, was facing huge financial losses due in part to the company's decision ''to become specialists in large, gas-guzzling cars . . . right at the time . . . [of] oil boycotts and crises with the price of gasoline.'' Nat'l Public Radio, Examining Chrysler's 1979 Rescue, NPR.ORG (Nov. 12, 2008), available at *https://www.npr.org/templates/story/story.php?storyId=96922222.* In exchange for Chrysler committing to an operating plan that included ''an energy efficiency plan setting forth steps to be taken by the Corporation to reduce United States dependence on petroleum,'' Congress extended to Chrysler about $1.5 billion in loan guarantees. See Public Law 96–185 §§ 2(8), 4.

[7] *Id.* § 18.

[8] *See* Electric and Hybrid Vehicle Research, Development, and Demonstration Program; Equivalent Petroleum-Based Fuel Economy Calculation, Final Rule, 46 FR 22747 (April 21, 1981).

[9] Id. at 22,748–22749.

[10] *Id.* at 22,748.

[11] *Id.* at 22,748–22,749.

[12] *Id.* at 22,750.

[13] *Id.*

[14] DOE, Electric and Hybrid Vehicles Program, 11th Annual Report to Congress at 30 (March 1988).

[15] *Id.*

[16] *See* Electric and Hybrid Vehicle Research, Development, and Demonstration Program; Equivalent Petroleum-Based Fuel Economy Calculation, Proposed Rule, 59 FR 5336, 5337 (Feb. 4, 1994). 17 E.g. Public Law 100–494 § 6(a), 102 Stat. 2411 (Oct. 14, 1988); Public Law 102–486 § 403, 106 Stat. 2776 (Oct. 24, 1992).

[17] Public Law 103–272 §§ 1(a); (e), 108 Stat. 745 (July 5, 1994).

[18] Public Law 103–272 §§ 1(a); (e), 108 Stat. 745 (July 5, 1994).

[19] *Id.* § 1(e), adding 49 U.S.C. 32902(a), (c), (f), (g).

[20] *Id.* § 1(e), adding 49 U.S.C. 32901(a)(1), (8); 32902 (h)(1).

[21] *Id.* § 1(e), adding 49 U.S.C. 32904(a)(2).

[22] *Id.*

industry,'' DOE proposed to revive and update the method of calculating EV CAFE values.[23] The agency proposed a suite of changes from the 1981 rule, including to ''change the way the electricity generation output, input, and relative value terms are calculated,'' to ''incorporat[e] off-peak electric vehicle charging and the relative scarcity of electricity generation fuel sources,'' and to change the test procedure used to determine the electrical efficiency of EVs.[24] DOE noted that ''[w]hile the determination of the energy efficiency of an [EV] . . . is a straightforward task based on physical testing,'' the remaining required factors were ''subject to less precise quantification.'' [25] As proposed, the PEF would no longer have included the ''relative value'' weighting of fuels by marginal price per BTU, and would instead have added a ''relative scarcity'' factor derived from the U.S. share of the world reserve market and ''the rate at which the U.S. [was] depleting each fuel source's reserves.'' [26] These proposed regulations did not meaningfully account specifically for ''the need of the Nation to conserve all forms of energy'' or for ''the relative . . . value'' of generation fuels. The 1994 proposal was never finalized.

In 1999, DOE withdrew the 1994 proposal and proposed an alternative PEF methodology.[27] Noting ''criticisms related to the scarcity factor,'' ''DOE elected to perform an additional search of the literature'' and ''determined that the fuels used to produce electricity'' ''are quite abundant'' such that ''scarcity [did] not appear to be a concern'' and ''should not be a guiding factor in the rulemaking at [that] time.'' [28] ''DOE then examined existing law [at 49 U.S.C. 32905] for determining the petroleum-equivalent fuel economy of other types of alternative fuel vehicles.'' [29] ''Two of the most common liquid alternative fuels,'' M85 and E85, contained 85% alternative fuel and ''15 percent unleaded gasoline by volume,'' so the statute ''deemed'' ''[t]he petroleum equivalent fuel economy of E85 and M85 powered vehicles'' to be ''the measured fuel economy value'' divided by 0.15.[30] DOE then noted that Section 32905(c) ''extends this approach to gaseous fueled vehicles,'' ''divid[ing] by 0.15,'' even though the gaseous fuel ''contains no gasoline whatsoever.'' [31]

Observing that ''the methods specified in [Section 32905]'' ''intentionally and substantially overstated'' the ''true energy efficiency of'' those vehicles, DOE proposed an EV PEF ''conceptually based on the [provisions] at 49 U.S.C. 42905(c).'' [32] The agency contended that this approach would ''help to accelerate the early commercialization of electric vehicles'' and be ''more consistent with the regulatory treatment of other alternative fuel vehicles.'' [33] DOE thus proposed eliminating the relative value and scarcity factors from the 1981 rule and the 1994 proposal and instead including a ''fuel content'' factor of 1/0.15 in the PEF.[34] In effect, the fuel content factor added ''a multiple of 6.67'' to every EV's imputed fuel economy.[35] DOE justified this multiplier, drawn from statutory provisions applicable to gaseous fueled vehicles, as providing ''consistency,'' ''similar treatment to manufacturers of all types of alternative fuel vehicles,'' and ''simplicity and directness.'' [36]

The agency finalized the proposal in 2000 without substantial modification.[37] DOE also committed to review the regulations after five years and ''publish the findings of the review.'' [38] Petitioners have been unable to locate this publication, and it is not clear if the review occurred.

DOE Should Update Regulations for Calculating EV CAFE Values

DOE's regulations for calculating CAFE program fuel economy values for EVs are long overdue to be updated. Statute requires the agency to ''review those values each year and determine and propose necessary revisions'' based on the enumerated statutory factors.[39] The regulations have not been updated in more than twenty years and the data underlying the extant regulations are materially—and increasingly—inaccurate. Further, the statute requires that the equivalency values be ''based on'' the statutory factors.[40] The extant EV equivalency values are instead based on other statutory provisions applicable to gaseous fueled vehicles, with the consequence that EV CAFE values are driven by the seven-fold multiplier of the ''fuel content factor'' [41] rather than the statutory factors applicable to EVs. The effect is that EV CAFE values are significantly inflated beyond what the relevant statutory factors contemplate.

The consequences of outdated regulations are not academic. Because NHTSA is prohibited from considering the fuel economy of EVs when determining the maximum feasible CAFE standards for a given model year,[42] but must include EVs when calculating compliance with those standards,[43] excessively high imputed fuel economy values for EVs means that a relatively small number of EVs will mathematically guarantee compliance without meaningful improvements in the real-world average fuel economy of automakers' overall fleets.

DOE Should Update Its Regulations To Include the Best Available Data

The values for several component terms in the PEF equation are no longer accurate. For example, the ''gasoline-equivalent energy content of electricity factor'' (Eg) is determined by combining various values for the efficiency of national electricity and petroleum generation and distribution.[44] The efficiency of many of these processes has improved over the last twenty years. When DOE last updated regulations in 2000, the ''U.S. average fossil-fuel electricity generation efficiency'' (Tg) was 0.328, but the actual current efficiency is closer to 0.389.[45]

Further, the generation fuel mix has changed significantly since 2000. In 2000, fossil fuels made up about 71% of the generation mix, while renewables made up only about 9% and nuclear power provided the remaining 20%.[46] In 2020, fossil fuels made up only about 60%, and within that pool natural gas is increasingly supplanting coal and petroleum.[47] Renewables made up 20%

[23] Electric and Hybrid Vehicle Research, Development, and Demonstration Program; Equivalent Petroleum-Based Fuel Economy Calculation, Proposed Rule, 59 FR 5336, 5337 (Feb. 4, 1994).

[24] *Id.*

[25] *Id.*

[26] *Id.* at 5338.

[27] Electric and Hybrid Vehicle Research, Development, and Demonstration Program; Petroleum-Equivalent Fuel Economy Calculation, Proposed Rule, 64 FR 37905 (July 14, 1999).

[28] *Id.* at 37907.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.* at 37907.

[33] *Id.* at 37906.

[34] *Id.* at 37907–908.

[35] *Id.* at 37908.

[36] *Id.*

[37] Electric and Hybrid Vehicle Research, Development, and Demonstration Program; Petroleum-Equivalent Fuel Economy Calculation, Final Rule, 65 FR 36986 (June 12, 2000).

[38] *See* 10 CFR 474.5.

[39] 49 U.S.C. 32904(a)(2)(B) (emphasis added).

[40] 49 U.S.C. 32904(a)(2)(B).

[41] 65 FR at 36987.

[42] 49 U.S.C. 32902(h).

[43] 49 U.S.S. § 32904(a)(2)(B).

[44] 65 FR at 36987.

[45] *Compare id. with, e.g.,* U.S. Energy Information Administration (EIA), *Electric Power Annual,* Data Tables, *https://www.eia.gov/electricity/annual/* (last visited October 22, 2021); EPA, *eGRID: Download Data, https://www.epa.gov/egrid/download-data* (last visited October 22, 2021).

[46] EIA, *Total Energy, https://www.eia.gov/totalenergy/data/annual/showtext.php?t=ptb0802a* (last visited October 8, 2021).

[47] EIA, *Electricity explained, https://www.eia.gov/energyexplained/electricity/electricity-in-the-us-generationcapacity-and-sales.php* (last visited October 8, 2021).

and will continue to grow, and nuclear energy made up the remaining 20%.[48] DOE should consider whether, in light of the required statutory factors, using a fossil-fuel only efficiency term is appropriate. DOE should also determine how, in light of the statutory scarcity, value, and conservation considerations, fuel sources such as wind and solar should be treated in terms of generation efficiency.

Other real-world changes since 2000 should also inform the agency's regulations. For example, data on the harms of fossil-fuel driven climate change, on the scale of petroleum consumption by regulated vehicles, and on the projected fleet share of EVs, have all changed over the past twenty years. DOE should ensure that its regulations are based on the best available data fitted to the required statutory considerations.

DOE Should Update Its Regulations To Comport With the Required Statutory Factors and To Support the Goals of DOT's CAFE Program

Existing regulations are arguably inconsistent with DOE's statutory mandate. The statute provides that EV CAFE values should be ''based on'' the statutory factors at 49 U.S.C. 32904. But current regulations are actually ''based on the existing regulatory approach at 49 U.S.C. 32905 for determining the petroleum-equivalent fuel economy of alternative [gaseous] fueled vehicles.'' [49] The result is that the magnitude of the PEF is primarily driven by the 1/0.15 multiplier applicable to those vehicles rather than being driven by the considerations mandated for EVs.

To illustrate, the value of the PEF currently attributable to the Section 32904 EV factors is only 12,307 Wh/gal.[50] But with the addition of the Section 32905 multiplier, the PEF becomes 82,049 Wh/gal.[51] In practical terms, the EV fuel economy used for CAFE compliance is seven-fold higher due to the inclusion of the Section 32905 multiplier. So, for example, for the bestselling 2021 Tesla Model Y (Standard Range RWD) measured at 260 Wh/mile,[52] the CAFE value under DOE's current treatment of the Section 32904 factors alone would be 51 mpg,[53] but with the multiplier the same vehicle is imputed a 315 mpg value for CAFE compliance purposes.[54]

The entire delta from 51 mpg to 315 mpg is virtual. It does not reflect any efficiency characteristic of the EV or of the national electricity generation system, nor does it reflect any discretionary adjustment tied to the relevant statutory factors. Because CAFE is a fleet average standard,[55] the virtual increase in EV fuel economy far above the average means that automakers do not need to improve the fleet efficiency of their below-average ICEVs nearly as much to comply with the standard. And NHTSA is constrained from fully compensating for the virtual increase because the statute prohibits NHTSA from ''consider[ing] the fuel economy of [EVs]'' when determining what average standard is maximum feasible for a model year.[56]

If the 1/0.15 multiplier was accounting for a real-world improvement in fuel conservation or had the effect of causing net improvements in real-world fuel efficiency, then the multiplier might be more defensible. But DOE justified its inclusion primarily on the basis of affording similar treatment to EVs as gaseous fueled vehicles.[57] As a purely legal matter, this justification is questionable, as the statute expressly provides for different treatment between these types of vehicles.[58]

DOE should holistically review its approach to calculating the PEF to ensure its regulations comport with the relevant statutory language. For example, the statute provides that DOE should account for ''the need of the United States to conserve all forms of energy.'' [59] But current PEF regulations do not appear to meaningfully address the need for national scale energy conservation, with DOE only citing this consideration in passing as a justification for including the ''accessory factor'' in the PEF equation.[60] It is not plausible that Congress intended the sweeping direction to consider ''the need of the United States to conserve all forms of energy'' to be satisfied merely by minor PEF adjustments for the ''minority of electric vehicles . . . in colder climates'' that ''may be equipped'' with petroleum-powered cabin heaters.[61] Particularly given the ongoing and increasing threat from fossil-fuel-driven climate change, DOE's regulations should more meaningfully address the need to conserve all forms of energy.[62]

DOE should also work with NHTSA to ensure PEF regulations further the goals of the CAFE program. By way of illustration, DOE historically suggested that EV CAFE values should be high to help with ''early commercialization'' of EVs.[63] But that idea originates from now obsolete language in the 1979 Chrysler Corporation Loan Guarantee Act that directed DOE to evaluate whether including EVs in CAFE would have such an effect.[64] The agency reported to Congress that the EV CAFE provision was not effective at incentivizing early commercialization,[65] and when Congress consolidated the CAFE program in title 49 in 1994, it did not include that language from the Chrysler Loan Act.[66] In any event, any consideration of extra-textual incentives must not undermine the CAFE program's ''overarching goal of fuel conservation'' for all light-duty vehicles.[67]

The early commercialization of EVs has already occurred and EVs comprise a significant and increasing share of new motor vehicle sales each model year.[68] DOE should account for these changed circumstances, and work with

[48] *Id.*

[49] 65 FR at 36987.

[50] Id.

[51] *Id.*

[52] DOE, *Compare Side-by-Side for 2021 Tesla Model Y Standard Range RWDhttps://www.fueleconomy.gov/feg/Find.do?action=sbs&id=43880* (last visited October 6, 2021).

[53] Updating the underlying data from the 2000 rule values and reconsidering the appropriate application of the statutory factors in light of current circumstances and program goals will likely increase this value.

[54] These values come from dividing the PEF (in Wh/gal) by the EPA-measured combined electrical energy consumption value (in Wh/mile). *See* 10 CFR part 474, App.

[55] 49 U.S.C. 32902.

[56] *See* 49 U.S.C. 32901(a)(1), (8), § 32902(h).

[57] 65 FR at 36987.

[58] *Cf., e.g., Russello* v. *United States,* 464 U.S. 16, 23 (1983) (''Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'') (cleaned up).

[59] 49 U.S.C. 32904(a)(2)(B)(iii).

[60] 65 FR at 36987; cf. 59 FR at 5338.

[61] *Compare* 49 U.S.C. 32904(a)(2)(B)(iii) *with* 65 FR at 36987.

[62] As another example, the statute contemplates that the procedure for calculating the PEF might be different across ''various classes of electric vehicles,'' 49 U.S.C. 32904(a)(2)(B), but DOE has only issued regulations equally applicable to all classes of EVs. DOE should consider whether it is appropriate to differentiate among different classes of EVs for purposes of calculating CAFE values.

[63] 64 FR at 37906.

[64] *Id.; compare* Public Law 96–185 § 18(1) with § 18(3).

[65] DOE, Electric and Hybrid Vehicles Program, 11th Annual Report to Congress at 30 (March 1988).

[66] *See* Public Law 103–272 §§ 1(a); (e), 108 Stat. 745 (July 5, 1994).

[67] *Ctr. for Biological Diversity* v. *NHTSA,* 538 F.3d 1172, 1195 (9th Cir. 2008) (quoting *Ctr. for Auto Safety* v. *NHTSA,* 793 F.2d 1322, 1340 (D.C. Cir. 1986)).

[68] *E.g. The White House, Press Release, FACT SHEET: President Biden Announces Steps to Drive American Leadership Forward on Clean Cars and Trucks* (Aug. 5, 2021) (''President Biden Outlines Target of 50% Electric Vehicle Sales Share in 2030 . . . .''), *available at https://www.whitehouse.gov/briefing-room/statementsreleases/2021/08/05/fact-sheet-president-biden-announces-steps-to-drive-american-leadership-forward-onclean-cars-and-trucks/.*

NHTSA to ensure that the fuel economy imputed to EVs pursuant to 49 U.S.C. 32904 is not set at a level that undermines the overarching statutory goals of energy and fuel conservation. To be sure, Petitioners believe that producing significant and increasing numbers of EVs should be an available means for automakers to comply with increasingly stringent CAFE standards. But the relative energy efficiency of EVs compared to ICEVs, coupled with the ongoing shift to increasingly efficient electricity generation from renewable sources, should ensure that baseline EV CAFE values will compare favorably to leading ICEVs. The statute further provides DOE additional discretion—through consideration of factors ''subject to less precise quantification'' [69] such as ''the need of the United States to conserve all forms of energy,'' and ''the relative scarcity and value to the Nation of all fuel used to generate electricity'' [70]—to adjust that baseline value to a level that will optimize the overall real-world reduction in fuel consumption and achieve the core purpose of EPCA's fuel-economy chapter.

Conclusion

For the above reasons, Petitioners ask that DOE grant this petition and initiate a rulemaking process to revise and update the regulations at 10 CFR part 474 for calculating equivalent petroleum-based fuel economy values for EVs. Petitioners thank DOE for its consideration.

Respectfully submitted,

Pete Huffman

Natural Resources Defense Council.

Joshua Berman,

Vera P. Pardee,

Law Office of Vera Pardee, Counsel for Sierra Club.

[FR Doc. 2021–27624 Filed 12–28–21; 8:45 am]

BILLING CODE 6450–01–P

[69] 59 FR at 5337.

[70] 49 U.S.C. 32904(a)(2)(B)(iii).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2021–1167; Project Identifier AD–2021–00823–E]

RIN 2120–AA64

Airworthiness Directives; General Electric Company Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede Airworthiness Directive (AD) 2019–22–05, which applies to all General Electric Company (GE) CF34–8C model turbofan engines. AD 2019–22–05 requires initial and repetitive inspections of the operability bleed valve (OBV) fuel tubes, OBV bleed air manifold link rod assemblies, and the OBV fuel fittings. AD 2019–22–05 also requires replacement of OBVs or related OBV hardware that fail inspection. Since the FAA issued AD 2019–22–05, the manufacturer has redesigned the OBV, which terminates the need for the repetitive inspections. This proposed AD would require initial and repetitive inspections of the OBV fuel tubes, OBV bleed air manifold link rod assemblies, and the OBV fuel fittings. This proposed AD would also require replacement of OBVs or related OBV hardware that fail inspection. As a terminating action to the repetitive inspections, this proposed AD would require replacement of certain OBVs installed on GE CF34–8C and CF34–8E model turbofan engines. 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 February 14, 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 General Electric Company, 1 Neumann Way, Cincinnati, OH 45215; phone: (513) 552–3272; email: *aviation.fleetsupport@ge.com;* website: *https://www.ge.com.* You may view this service information at the Airworthiness Products Section, Operational Safety Branch, FAA, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (817) 222–5110.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2021–1167; 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: Scott Stevenson, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: (781) 238–7132; fax: (781) 238–7199; email: *Scott.M.Stevenson@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–2021–1167; Project Identifier AD–2021–00823–E'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend the proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments 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 we receive about this proposed AD.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this

NPRM. Submissions containing CBI should be sent to Scott Stevenson, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803. 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 issued AD 2019–22–05, Amendment 39–19784 (84 FR 63569, November 18, 2019), (AD 2019–22–05), for all GE CF34–8C1, CF34–8C5, CF34–8C5A1, CF34–8C5B1, CF34–8C5A2, and CF34–8C5A3 model turbofan engines. AD 2019–22–05 was prompted by multiple reports of fuel leaks, some leading to engine fires, that have occurred as a result of malfunctions related to the OBV. AD 2019–22–05 requires initial and repetitive inspections of the OBV fuel tubes, OBV bleed air manifold link rod assemblies, and the OBV fuel fittings. AD 2019–22–05 also requires replacement of OBVs or related OBV hardware that fail inspection. The agency issued AD 2019–22–05 to prevent failure of the OBV.

Actions Since AD 2019–22–05 Was Issued

Since the FAA issued AD 2019–22–05, the manufacturer redesigned the OBV to eliminate the need for the repetitive inspections of the OBV fuel tubes, OBV bleed air manifold link rod assemblies, and the OBV fuel fittings. The manufacturer has issued service information specifying procedures to replace certain OBVs installed on CF34–8C1, CF34–8C5, CF34–8C5A1, CF34–8C5B1, CF34–8C5A2, CF34–8C5A3 (CF34–8C), and GE CF34–8E2, CF34–8E2A1, CF34–8E5, CF34–8E5A1, CF34–8E5A2, CF34–8E6, and CF34–8E6A1 (CF34–8E) model turbofan engines. Additionally, the FAA determined that the CF34–8E model turbofan engines are susceptible to the same unsafe condition as the CF34–8C model turbofan engines, and therefore, added the CF34–8E model turbofan engines to the applicability of this proposed AD. The FAA is proposing to require installation of the newly-designed OBV as a terminating action to the repetitive inspections required for CF34–8C model turbofan engines. The FAA is also proposing to require replacement of certain OBVs installed on CF34–8E model turbofan engines.

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 GE CF34–8C Service Bulletin (SB) 75–0020 R04, dated May 10, 2019 (GE SB 75–0020). The SB specifies procedures for inspecting the bleed air manifold link rod assemblies; the supply, return, and drain fuel fittings; and the fuel tubes on the OBV. The SB also specifies procedures for performing corrective actions and replacing any OBVs or related OBV hardware that fail the inspection criteria. The Director of the Federal Register approved the incorporation by reference of GE SB 75–0020 as of December 23, 2019 (84 FR 63569, November 18, 2019).

The FAA reviewed GE CF34–8C SB 75–0025 R01, dated August 1, 2019. This SB describes procedures for replacing and upgrading the suspect population of OBVs VIN 5000728–104 (part number (P/N) 4123T71P02), VIN 5000728–106 (P/N 4123T71P03), and VIN 5080046–101 (P/N 4123T71P04).

The FAA reviewed GE CF34–8E SB 75–0019 R01, dated August 1, 2019. This SB describes procedures for replacing and upgrading the suspect population of OBVs VIN 5000728–104 (P/N 4123T71P02), VIN 5000728–106 (P/N 4123T71P03), and VIN 5080046–101 (P/N 4123T71P04).

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 reviewed GE CF34–8C SB 75–0026 R00, dated February 21, 2020. This SB introduces OBV VIN 5080046–103 (P/N 4123T71P06).

The FAA also reviewed GE CF34–8E SB 75–0021 R00, dated February 21, 2020. This SB introduces OBV VIN 5080046–103 (P/N 4123T71P06).

Proposed AD Requirements in This NPRM

This proposed AD would retain certain requirements of AD 2019–22–05. This proposed AD would require initial and repetitive inspections of the OBV fuel tubes, OBV bleed air manifold link rod assemblies, and the OBV fuel fittings and replacement of OBVs or related OBV hardware that fail inspection. As a terminating action to the repetitive inspections of the OBV fuel tubes, OBV bleed air manifold link rod assemblies, and the OBV fuel fittings, this proposed AD would require replacement of certain OBVs installed on GE CF34–8C model turbofan engines. This proposed AD would also require replacement of certain OBVs installed on CF34–8E model turbofan engines.

Differences Between This Proposed AD and the Service Information

GE SB 75–0020 specifies that the results of the inspections must be documented in an inspection chart form and sent to GE Product Support Engineering. This proposed AD would not mandate sending information to GE Product Support Engineering.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 1,172 engines installed on 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 product	Cost on U.S. operators
Replace OBV	2 work-hours × $85 per hour = $170	$17,230	$17,400	$20,392,800
Inspect OBV fuel tubes, assemblies, and fittings.	1 work-hour × 85 per hour = 85	0	85	99,620

The FAA estimates the following costs to do any necessary replacements that would be required based on the results of the proposed inspection. The agency has no way of determining the number of aircraft that might need this replacement.

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Replace OBV tubes, clamps, support hardware	2.25 work-hours × $85 per hour = $191.25	$3,786.25	$3,977.50

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 that the 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:

a. Removing Airworthiness Directive 2019–22–05, Amendment 39–19784 (84 FR 63569, November 18, 2019); and

b. Adding the following new airworthiness directive:

General Electric Company: Docket No. FAA–2021–1167; Project Identifier AD–2021–00823–E.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) action by February 14, 2022.

(b) Affected ADs

This AD replaces AD 2019–22–05, Amendment 39–19784 (84 FR 63569, November 18, 2019).

(c) Applicability

This AD applies to General Electric Company (GE) CF34–8C1, CF34–8C5, CF34–8C5A1, CF34–8C5B1, CF34–8C5A2, CF34–8C5A3, CF34–8E2, CF34–8E2A1, CF34–8E5, CF34–8E5A1, CF34–8E5A2, CF34–8E6, and CF34–8E6A1 model turbofan engines.

(d) Subject

Joint Aircraft System Component (JASC) Code 7532, Compressor Bleed Valve.

(e) Unsafe Condition

This AD was prompted by multiple reports of fuel leaks, some leading to engine fires, that have occurred as a result of malfunctions related to the operability bleed valve (OBV). The FAA is issuing this AD to prevent failure of the OBV. The unsafe condition, if not addressed, could result in an engine fire and damage to the airplane.

(f) Compliance

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

(g) Required Actions

(1) For CF34–8C1, CF34–8C5, CF34–8C5A1, and CF34–8C5B1 model turbofan engines with serial numbers (S/Ns): 965101 through 965670 inclusive; 194101 through 194999 inclusive; and 195101 through 195653 inclusive:

(i) Within 880 flight hours (FHs) since the previous inspection, 500 FHs after December 23, 2019 (the effective date of AD 2019–22–05), or 6,880 FHs since new, whichever occurs later, inspect the OBV bleed air manifold link rod assemblies, the OBV fuel fittings, and the OBV fuel tubes.

(ii) Thereafter, within every 880 FHs since the previous inspection, perform additional repeat inspections of the OBV bleed air manifold link rod assemblies, the OBV fuel fittings, and the OBV fuel tubes.

(iii) Use the Accomplishment Instructions, paragraph 3.B., of GE CF34–8C Service Bulletin (SB) 75–0020 R04, dated May 10, 2019 (GE SB 75–0020), to perform inspections required by paragraphs (g)(1)(i) and (ii) of this AD and, per the inspection criteria in paragraph 3.B., of GE SB 75–0020 (the inspection criteria), do the following:

(A) Before further flight, if fuel leakage is observed at the OBV fittings or the OBV fittings are loose, replace the OBV with a part eligible for installation.

(B) Before further flight, if any OBV fuel tube clamp is found to be outside the inspection criteria, re-torque the OBV fuel tube clamp or replace the OBV fuel tube clamp.

(C) Within 50 flight cycles (FCs) after the inspections required by paragraphs (g)(1)(i) and (ii) of this AD, replace any link rod hardware found to be outside the inspection criteria. Until the worn link rod hardware is replaced, the OBV fittings must be inspected before the first flight of each day for leakage and looseness in accordance with the inspection criteria. If the OBV fittings fail to meet the inspection criteria, before further flight, replace the OBV and worn link rod hardware.

(2) For CF34–8C5B1 model turbofan engines with S/Ns not listed in paragraph (g)(1) of this AD and for all CF34–8C5A2 and CF34–8C5A3 model turbofan engines, perform the following:

(i) Within 880 FHs after the effective date of this AD or prior to accumulating 6,880 FHs since new, whichever occurs later, perform an initial inspection of the OBV bleed air manifold link rod assemblies, OBV fuel fittings, and OBV fuel tubes.

(ii) Thereafter, within every 880 FHs since the last inspection, repeat the inspection of the OBV bleed air manifold link rod assemblies, OBV fuel fittings, and OBV fuel tubes.

(iii) Use the Accomplishment Instructions, paragraph 3.B., of GE SB 75–0020, to perform the inspections in paragraph (g)(2)(i) or (ii) of this AD and, per the inspection criteria in paragraph 3.B., of GE SB 75–0020, do the following:

(A) Before further flight, if fuel leakage is observed at the OBV fittings or the OBV fittings are loose, replace the OBV with a part eligible for installation.

(B) Before further flight, if any OBV fuel tube clamp is found to be outside the inspection criteria, re-torque the OBV fuel tube clamp or replace the OBV fuel tube clamp.

(C) Within 50 FCs after the inspections required by paragraphs (g)(2)(i) and (ii) of this AD, replace any link rod hardware found to be outside the inspection criteria. Until the worn link rod hardware is replaced, the OBV fittings must be inspected before the first flight of each day for leakage and looseness in accordance with the inspection criteria. If the OBV fittings fail to meet the inspection criteria, before further flight, replace the OBV and worn link rod hardware.

(3) For all affected engines with an installed OBV, VIN 5000728–104 part number (P/N) (P/N 4123T71P02), VIN 5000728–106 (P/N 4123T71P03), or VIN 5080046–101 (P/N 4123T71P04), having an OBV S/N listed in Appendix A, paragraph 4., of GE CF34–8C SB 75–0025 R01, dated August 1, 2019 (GE SB 75–0025), or Appendix A, paragraph 4., of GE CF34–8E SB 75–0019 R01, dated August 1, 2019 (GE SB 75–0019), respectively, within 180 days after the effective date of this AD, remove the OBV and replace with a part eligible for installation.

(4) For all affected engines with an installed OBV, VIN 5000728–104 (P/N 4123T71P02), VIN 5000728–106 (P/N 4123T71P03), or VIN 5080046–101 (P/N 4123T71P04), having an OBV S/N not listed in Appendix A, paragraph 4., of GE SB 75–0025 or Appendix A, paragraph 4., of GE SB 75–0019, respectively, remove the OBV and replace with a part eligible for installation within the following compliance times:

(i) Within 16 months after the effective date of this AD for an OBV that has accumulated more than 25,000 FHs since new.

(ii) Within 32 months after the effective date of this AD for an OBV that has accumulated between 12,500 to 25,000 FHs since new, inclusive.

(iii) Within 48 months after the effective date of this AD for an OBV with fewer than 12,500 FHs since new.

(5) For all affected engines with an installed OBV, VIN 5080046–102 (P/N 4123T71P05), before the OBV accumulates 25,000 FHs since new or within 10 years after the effective date of this AD, whichever occurs first, remove the OBV and replace with a part eligible for installation.

(h) Terminating Action

Installation of an OBV that meets the definition of a part eligible for installation in paragraph (i) of this AD constitutes terminating action for the inspections required by paragraphs (g)(1) and (2) of this AD.

(i) Definition

For the purpose of this AD, a ''part eligible for installation'' is an OBV VIN 5080046–103 (P/N 4123T71P06) or an OBV reworked to VIN 5080046–103 (P/N 4123T71P06).

(j) No Reporting Requirement

The reporting instructions specified in GE SB 75–0020 are not required by this AD.

(k) Credit for Previous Actions

You may take credit for the initial inspection required by paragraph (g)(1)(i) or (2)(i), of this AD if you performed this initial inspection before the effective of this AD using GE CF34–8C SB 75–0019 R01, dated October 24, 2017, or R00, dated August 4, 2017; or GE CF34–8C–AL S/B 75–0020, Revision 03, dated December 14, 2018, as applicable.

(l) Alternative Methods of Compliance (AMOCs)

(1) The Manager, ECO 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 ECO Branch, send it to the attention of the person identified in paragraph (m)(1) of this AD. Information may be emailed to: *ANE-AD-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.

(m) Related Information

(1) For more information about this AD, contact Scott Stevenson, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: (781) 238–7132; fax: (781) 238–7199; email: *Scott.M.Stevenson@faa.gov.*

(2) For service information identified in this AD, contact General Electric Company, 1 Neumann Way, Cincinnati, OH 45215; phone: (513) 552–3272; email: *aviation.fleetsupport@ge.com;* website: *https://www.ge.com.* You may view this referenced service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (817) 222–5110.

Issued on December 21, 2021.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2021–28134 Filed 12–28–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2021–1156; Airspace Docket No. 19–AAL–28]

RIN 2120–AA66

Proposed Establishment of United States Area Navigation (RNAV) Route T–364; Kotzebue, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to establish United States Area Navigation (RNAV) route T–364 in the vicinity of Kotzebue, AK in support of a large and comprehensive T-route modernization project for the state of Alaska.

DATES: Comments must be received on or before February 14, 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; telephone: 1(800) 647–5527, or (202) 366–9826. You must identify FAA Docket No. FAA–2021–1156; Airspace Docket No. 19–AAL–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 Rules and Regulations Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783. FAA Order JO 7400.11F is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order JO 7400.11F at NARA, email: *fr.inspection@nara.gov* or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

FOR FURTHER INFORMATION CONTACT: Christopher McMullin, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would expand the availability of RNAV in Alaska and improve the efficient flow of air traffic within the National Airspace System (NAS) by lessening the dependency on ground based navigation.

Comments Invited

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

Communications should identify both docket numbers (FAA Docket No. FAA–2021–1156; Airspace Docket No. 19–AAL–28) and be submitted in triplicate to the Docket Management Facility (see **ADDRESSES** section for address and phone number). You may also submit comments through the internet at *https://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2021–1156; Airspace Docket No. 19–AAL–28''. The postcard will be date/time stamped and returned to the commenter.

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

Availability of NPRM

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

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

Availability and Summary of Documents for Incorporation by Reference

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

Background

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

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

The aviation industry/users have indicated a desire for the FAA to transition the Alaskan en route navigation structure away from dependency on Non-Directional Beacons (NDB), and move to develop and improve the RNAV route structure. The FAA proposes to establish RNAV route T–364 between the COGNU, AK, waypoint (WP) northwest of Wales, AK to the Kotzebue, AK, (OTZ) VHF Omnidirectional Radar/Distance Measuring Equipment (VOR/DME). The proposed route would provide an alternate airway for Colored airways, B–8 and B–2, in anticipation of the future decommissioning of the Hotham, AK, (HHM) and the Shishmaref, AK, (SHH) NDBs. Furthermore, the proposed route would allow for a lower GNSS MEA, while providing connectivity to instrument approach procedures at Wales Airport, Alaska.

The Proposal

The FAA is proposing an amendment to 14 CFR part 71 to establish RNAV route T–364 in the vicinity of Kotzebue, AK in support of a large and comprehensive T-route modernization project for the state of Alaska. The proposed route is described below.

T–364: The FAA proposes to establish T–364 between the COGNU, AK WP and the Kotzebue, AK, (OTZ) VOR/DME.

United States Area Navigation Routes are published in paragraph 6011 of FAA Order JO 7400.11F dated August 10, 2021, and effective September 15, 2021, which is incorporated by reference in 14 CFR 71.1. The RNAV listed in this document would 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 Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F,

''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11F, Airspace Designations and Reporting Points, dated August 10, 2021, and effective September 15, 2021, is amended as follows:

Paragraph 6011 United States Area Navigation Routes

* * * * *

T–364 COGNU, AK TO KOTZEBUE, AK [NEW]

COGNU, AK	WP	(Lat. 65°48′29.23″ N, long. 167°50′06.18″ W)
HIPIV, AK	WP	(Lat. 66°15′29.11″ N, long. 166°03′23.59″ W)
Kotzebue, AK (OTZ)	VOR/DME	(Lat. 66°53′08.46″ N, long. 162°32′23.77″ W)

* * * * *

Issued in Washington, DC, on December 22, 2021.

Scott M. Rosenbloom,

Acting Manager, Rules and Regulations Group.

[FR Doc. 2021–28240 Filed 12–28–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2021–1153; Airspace Docket No. 19–AAL–76]

RIN 2120–AA66

Proposed Amendment of United States Area Navigation (RNAV) Route T–278; Sisters Island, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend United States Area Navigation (RNAV) route T–278 in the vicinity of Sisters Island, AK in support of a large and comprehensive T-route modernization project for the state of Alaska.

DATES: Comments must be received on or before February 14, 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; telephone: 1(800) 647–5527, or (202) 366–9826. You must identify FAA Docket No. FAA–2021–1153; Airspace Docket No. 19–AAL–76 at the beginning of your comments. You may also submit comments through the internet at *https://www.regulations.gov.*

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

FOR FURTHER INFORMATION CONTACT: Christopher McMullin, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would expand the availability of RNAV in Alaska and improve the efficient flow of air traffic within the National Airspace System (NAS) by lessening the dependency on ground based navigation.

Comments Invited

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

Communications should identify both docket numbers (FAA Docket No. FAA–2021–1153; Airspace Docket No. 19–AAL–76) and be submitted in triplicate to the Docket Management Facility (see ''**ADDRESSES**'' section for address and phone number). You may also submit comments through the internet at *https://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2021–1153; Airspace Docket No. 19–AAL–76''. The postcard will be date/time stamped and returned to the commenter.

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

contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM

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

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

Availability and Summary of Documents for Incorporation by Reference

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

Background

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

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

The aviation industry/users have indicated a desire for the FAA to transition the Alaskan en route navigation structure away from dependency on Non-Directional Beacons (NDB), and move to develop and improve the RNAV route structure. The FAA proposes to amend RNAV route T–278 by adjusting the segment of the airway between the HAPIT, AK, Fix and Sisters Island, AK, (SSR) VHF Omnidirectional Radar and Tactical Air Navigational System (VORTAC) by adding two new waypoints (WP), BIKUW, AK WP, and CSPER, AK WP to allow for a lower GNSS MEA. Additionally, the FAA proposes to extend the route from the Sisters Island, AK, (SSR) VORTAC to the RADKY, AK, WP, in order to provide connectivity with T–266. These amendments would support the future decommissioning of the Elephant Island, AK, (EEF) NDB.

The Proposal

The FAA is proposing an amendment to 14 CFR part 71 to amend RNAV route T–278 in the vicinity of Sisters Island, AK in support of a large and comprehensive T-route modernization project for the state of Alaska. The proposed route is described below.

T–278: The FAA proposes to amend T–278 between the HAPIT, AK, Fix and the Sisters Island, AK, (SSR) VORTAC by including two new waypoints on the segment and extending the route from SSR to the RADKY, AK, WP.

United States Area Navigation Routes are published in paragraph 6011 of FAA Order JO 7400.11F dated August 10, 2021, and effective September 15, 2021, which is incorporated by reference in 14 CFR 71.1. The RNAV listed in this document would 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 Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11F, Airspace Designations and Reporting Points, dated August 10, 2021, and effective September 15, 2021, is amended as follows:

Paragraph 6011 United States Area Navigation Routes.

* * * * *

T–278 HAPIT, AK to RADKY, AK [Amended]

HAPIT, AK	WP	(Lat. 58°11′57.57″ N, long. 137°31′12.45″ W)
CSPER, AK	WP	(Lat. 58°11′44.47″ N, long. 136°38′37.44″ W)
BIKUW, AK	WP	(Lat. 58°16′59.40″ N, long. 135°48′31.20″ W)
Sisters Island, AK (SSR)	VORTAC	(Lat. 58°10′39.58″ N, long. 135°15′31.91″ W)
RADKY, AK	Fix	(Lat. 58°08′00.39″ N, long. 134°29′55.53″ W)

* * * * *

Issued in Washington, DC, on December 21, 2021.

Scott M. Rosenbloom,

Acting Manager, Rules and Regulations Group.

[FR Doc. 2021–28242 Filed 12–28–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2021–1152; Airspace Docket No. 19–AAL–72]

RIN 2120–AA66

Proposed Amendment of United States Area Navigation (RNAV) Route T–269; Yakutat, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend United States Area Navigation (RNAV) route T–269 in the vicinity of Yakutat, AK in support of a large and comprehensive T-route modernization project for the state of Alaska.

DATES: Comments must be received on or before February 14, 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; telephone: 1(800) 647–5527, or (202) 366–9826. You must identify FAA Docket No. FAA–2021–1152; Airspace Docket No. 19–AAL–72 at the beginning of your comments. You may also submit comments through the internet at *https://www.regulations.gov.*

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

FOR FURTHER INFORMATION CONTACT: Christopher McMullin, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would expand the availability of RNAV in Alaska and improve the efficient flow of air traffic within the National Airspace System (NAS) by lessening the dependency on ground based navigation.

Comments Invited

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

Communications should identify both docket numbers (FAA Docket No. FAA–2021–1152; Airspace Docket No. 19–AAL–72) and be submitted in triplicate to the Docket Management Facility (see **ADDRESSES** section for address and phone number). You may also submit comments through the internet at *https://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2021–1152; Airspace Docket No. 19–AAL–72''. The postcard will be date/time stamped and returned to the commenter.

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

Availability of NPRM

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

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

Availability and Summary of Documents for Incorporation by Reference

This document proposes to amend FAA Order JO 7400.11F, Airspace Designations and Reporting Points, dated August 10, 2021, and effective

September 15, 2021. FAA Order JO 7400.11F is publicly available as listed in the **ADDRESSES** section of this document. FAA Order JO 7400.11F lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

Background

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

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

The aviation industry/users have indicated a desire for the FAA to transition the Alaskan en route navigation structure away from dependency on Non-Directional Beacons (NDB), and move to develop and improve the RNAV route structure. The FAA proposes to amend RNAV route T–269 by re-routing the segment of the airway between the Yakutat, AK, (YAK) VHF Omnidirectional Range/Distance Measuring Equipment (VOR/DME) to the Johnstone Point, AK, (JOH) VOR/DME by altering the segment in order to allow for a lower GNSS MEA along the route while ensuring continuous two-way VHF communications. The amended portion would include six new waypoints (WP), OXIDS; FOGNU; HORGI; ZIXIM; JOVOM; and OXUGE. Adding these new WPs would cause the MALAS, AK, WP to become a turn point, so it will be included in the legal description. Finally, the FAA proposes to remove six WPs, (TURTY; HAPIT; CENTA; YONEK; VEILL; and VIDDA), two navigational aids (Sparrevohn, AK, (SQA); and Bethel, AK, (BET)), and one Fix (FLIPS, AK, Fix) from the legal description, since they are not turn points on straight segments of the route. These points will still be depicted on the sectional chart, so it will be transparent to pilots.

The Proposal

The FAA is proposing an amendment to 14 CFR part 71 to amend RNAV route T–269 in the vicinity of Yakutat, AK in support of a large and comprehensive T-route modernization project for the state of Alaska. The proposed route is described below.

T–269: The FAA proposes to amend T–269 between the Yakutat, AK, (YAK) VOR/DME and the Johnstone Point, AK, (JOH) VOR/DME by including six new WPs on the segment in order to allow for a lower GNSS MEA in those areas. The proposal will also correct the legal description to remove points where there is no turn along the route.

United States Area Navigation Routes are published in paragraph 6011 of FAA Order JO 7400.11F dated August 10, 2021, and effective September 15, 2021, which is incorporated by reference in 14 CFR 71.1. The RNAV listed in this document would 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 Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11F, Airspace Designations and Reporting Points, dated August 10, 2021, and effective September 15, 2021, is amended as follows:

Paragraph 6011 United States Area Navigation Routes.

* * * * *

T–269 Annette Island, AK to MKLUK, AK [Amended]

Annette Island, AK (ANN)	VOR/DME	(Lat. 55°03′37.47″ N, long. 131°34′42.24″ W)
Biorka Island, AK (BKA)	VORTAC	(Lat. 56°51′33.87″ N, long. 135°33′04.72″ W)
Yakutat, AK (YAK)	VOR/DME	(Lat. 59°30′38.99″ N, long. 139°38′53.26″ W)
MALAS, AK	WP	(Lat. 59°39′58.52″ N, long. 140°34′57.61″ W)
OXIDS, AK	WP	(Lat. 59°41′51.68″ N, long. 141°03′17.73″ W)
FOGNU, AK	WP	(Lat. 59°53′31.88″ N, long. 141°49′02.83″ W)

HORGI, AK	WP	(Lat. 60°00′04.68″ N, long. 142°35′23.34″ W)
ZIXIM, AK	WP	(Lat. 60°03′48.75″ N, long. 143°13′27.77″ W)
JOVOM, AK	WP	(Lat. 60°07′40.55″ N, long. 143°42′56.99″ W)
OXUGE, AK	WP	(Lat. 60°06′15.81″ N, long. 144°13′28.54″ W)
KATAT, AK	WP	(Lat. 60°15′29.17″ N, long. 144°42′18.77″ W)
Johnstone Point, AK (JOH)	VOR/DME	(Lat. 60°28′51.43″ N, long. 146°35′57.61″ W)
Anchorage, AK (TED)	VOR/DME	(Lat. 61°10′04.32″ N, long. 149°57′36.51″ W)
MKLUK, AK	WP	(Lat. 60°26′40.04″ N, long. 165°55′17.28″ W)

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Issued in Washington, DC, on December 21, 2021.

Scott M. Rosenbloom,

Acting Manager, Rules and Regulations Group.

[FR Doc. 2021–28241 Filed 12–28–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 781, 782, 783, 784, 785, and 786

[Docket No. 211210–0258]

RIN 0694–AH95

Additional Protocol Regulations: Mandatory Electronic Submission of Reports Through the Additional Protocol Reporting System (APRS)

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Proposed rule.

SUMMARY: The Additional Protocol is an agreement between the United States and the International Atomic Energy Agency (IAEA) to allow monitoring and reporting of certain civil nuclear fuel cycle-related activities. The Bureau of Industry and Security (BIS) administers the Additional Protocol Regulations (APR), which implement the provisions of the Additional Protocol affecting U.S. industry and other U.S. persons engaged in certain civil nuclear fuel cycle-related activities that are not regulated by the U.S. Nuclear Regulatory Commission (NRC), or its domestic Agreement States, and are not situated at certain U.S. government locations. The APR describe the requirement to report such activities to BIS, as well as the conduct of on-site activities in conjunction with IAEA complementary access to locations where such civil nuclear fuel cycle-related activities take place. This rule proposes to amend the APR to replace the existing manual reporting and processing procedures with a mandatory requirement to submit reports and other documents on-line through the Additional Protocol Reporting System (APRS). As a result of this proposed change, all persons and locations in the United States that are subject to the reporting requirements in the APR would be required to register on-line to set up an APRS account, submit reports and other documents to BIS via APRS, and maintain current user account information in APRS. This rule also proposes to amend the APR to clarify and update other requirements (*e.g.,* by removing the provisions that address the *Initial Report* requirements for calendar year 2008, replacing the provisions that address *Amended Report* requirements, and revising the definitions of certain terms used in the APR).

DATES: Comments must be received by BIS no later than February 14, 2022.

ADDRESSES: You may submit comments, identified by docket number BIS–2021–0034 or RIN 0694–AH95, through any of the following:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. You can find this proposed rule by searching for its regulations.gov docket number, which is BIS–2021–0034.
- *Email: PublicComments@bis.doc.gov.* Include RIN 0694–AH95 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. Anyone submitting business confidential information should clearly identify the business confidential portion at the time of submission, file a statement justifying nondisclosure and referring to the specific legal authority claimed, and provide a non-confidential submission.

For comments submitted electronically containing business confidential information, the file name of the business confidential version should begin with the characters ''BC.'' Any page containing business confidential information must be clearly marked ''BUSINESS CONFIDENTIAL'' on the top of that page. The corresponding non-confidential version of those comments must be clearly marked ''PUBLIC.'' The file name of the non-confidential version should begin with the character ''P.'' The ''BC'' and ''P'' should be followed by the name of the person or entity submitting the comments or rebuttal 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 general information on APR requirements, including the APRS requirements proposed by this rule, contact Hung Ly, Treaty Compliance Division, Office of Nonproliferation and Treaty Compliance, Email: *Hung.Ly@bis.doc.gov.* For questions on the submission of comments in response to this proposed rule, contact Willard Fisher, Regulatory Policy Division, Office of Exporter Services, Bureau of Industry and Security, U.S. Department of Commerce, Email: *RPD2@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Protocol Additional to the Agreement Between the United States of America and the International Atomic Energy Agency for the Application of Safeguards in the United States of America (hereinafter referred to as the ''Additional Protocol'' or ''AP'') was developed to strengthen existing verification agreements established under the International Atomic Energy Agency (IAEA) safeguards regime and to promote the non-proliferation of nuclear weapons, which is a cornerstone of U.S. foreign and national security policy. The U.S. Additional Protocol requires the United States to declare to the IAEA a number of commercial nuclear and nuclear-related items, materials, and activities that have peaceful nuclear applications, but are also necessary elements for a nuclear weapons program.

To obtain the information needed to prepare the U.S. Declaration under the Additional Protocol, BIS administers the Additional Protocol Regulations (APR) (15 CFR 781–786) reporting requirements related to: (1) Nuclear fuel cycle research and development activities not involving nuclear materials; (2) nuclear-related

manufacturing, assembly, or construction activities; and (3) uranium hard-rock mining or ore beneficiation activities. Currently, U.S. industry and other U.S. persons with reportable activities submit their AP reports via facsimile, hand delivery, courier or the mail, using paper forms. BIS uses a manual process to receive and process these reports, to draft the U.S. Declaration for interagency review and approval, and to deliver the U.S. Declaration to the IAEA.

To facilitate compliance with the reporting requirements in the APR, BIS has developed the Additional Protocol Reporting System (APRS), an internet-based application, for industry to use to prepare and submit AP reports. APRS is a user-friendly, time-saving tool that will reduce the burden on industry related to the preparation and submission of these reports. Accordingly, BIS is proposing to amend the APR to replace the existing manual reporting requirement (*i.e.,* submission via facsimile, hand delivery, courier or the mail, using paper forms) with a requirement that all persons and locations with reportable activities register on-line for an APRS account and electronically submit their reports through APRS thereafter.

This proposed APRS electronic submission requirement would be mandatory only for the BIS administered AP reporting requirements described in § 783.1 of the APR. This APRS submission requirement would not be mandatory for information submitted in accordance with the AP-related reporting requirements in the regulations administered by the Nuclear Regulatory Commission (NRC), as follows: (1) Information concerning exports of nuclear facilities and equipment and non-nuclear materials (nuclear grade graphite for nuclear end use and deuterium) listed in Annex II of the Additional Protocol and submitted in accordance with 10 CFR 110.54(a); (2) facility information described in 10 CFR 75.10(b)(5) and submitted in accordance with 10 CFR 75.6(c) and 75.10(e); and (3) location information described in 10 CFR 75.11(b) and submitted in accordance with 10 CFR 75.6(d) and 75.11(c). Consequently, locations and sites subject to these NRC reporting requirements would have the option of continuing to submit their AP reports to BIS manually, in accordance with the instructions provided in the aforementioned NRC regulations, or registering for access to submit their reports electronically to BIS via APRS (provided that the locations and sites otherwise satisfy their NRC reporting requirements).

In addition to proposing the mandatory electronic submission of AP reports via APRS, this rule proposes to amend the APR to: (1) Clarify the uranium hard-rock mine and ore beneficiation activities that are subject to the reporting requirements in the APR; (2) remove the provisions that address the outdated requirement to submit *Initial Reports* covering calendar year 2008 activities; (3) replace the APR provisions that address the submission of amendments to AP reports with provisions requiring that such information be submitted through APRS; and (4) make miscellaneous updates and clarifications.

I. Establishment of Mandatory Requirement To Submit AP Reports via APRS

Part 781 (General Information and Overview)

This rule proposes to amend § 781.1 of the APR (Definitions of Terms) by adding a definition of the *Additional Protocol Reporting System (APRS).* This definition would describe APRS as ''the automated tool for persons or locations to submit electronic AP reports on nuclear fuel cycle related activities to BIS via the internet.''

Part 782 (General Information Regarding Reporting Requirements)

The most extensive and substantive amendments related to the establishment of APRS are proposed to the provisions in part 782 of the APR.

First, this rule proposes to replace the last two sentences in § 782.1 of the APR, which currently provide information on how to obtain hard copies of AP report forms, with a sentence instructing persons or locations subject to the APR reporting requirements to submit their AP reports via APRS in accordance with the instructions provided in §§ 782.5 and 782.6 of the APR (as proposed to be amended by this rule).

Second, this rule proposes to amend § 782.5 of the APR to indicate that persons and locations subject to the reporting requirements described in § 783.1 of the APR must submit their AP reports to BIS via the internet, using their APRS account. Section 782.5 also would be amended to indicate that BIS would provide persons and locations subject to the reporting requirements in the APR with information on how to use APRS (including the roles of the account administrator and individual users and how to electronically file AP reports with BIS) as part of the APRS registration process. Furthermore, this section would indicate that the AP Forms required to submit these reports, including the due dates of the reports, are identified in supplement no. 1 to part 783 of the APR and may be accessed via the location's APRS account. The AP website maintained by BIS at *https://www.bis.doc.gov/index.php/other-areas/additional-protocol-ap,* as updated to address the mandatory APRS requirements proposed in this rule for the submission of AP reports required by the APR (*e.g.,* by including an ''*Additional Protocol Reporting System (APRS) User Manual*''), also would be referenced in § 782.5 as another source of information on how to comply with the AP reporting requirements.

Third, this rule proposes to revise § 782.6 of the APR to require U.S. persons or locations with reportable activities under the APR to register on-line with BIS to request the establishment of a user account for the purpose of electronically submitting AP reports through the APRS. Specifically, each person or location with reportable activities under the APR, as proposed to be amended by this rule, would be required to designate at least one individual who would be authorized to act on behalf of that person or location as an APRS account administrator. The account administrator would be responsible for registering to open an account under APRS for the purpose of submitting AP reports to BIS on behalf of the person or location.

To register for an account in APRS, the account administrator would visit the APRS login page, at *http://www.ap.gov/XXXX,* and provide the following information to BIS: (1) The name and address of the person or location with reportable activities; and (2) the account administrator's name, telephone and facsimile numbers, and email address. The account administrator also would be required to certify the person's or location's compliance with the requirements of the APR, including any requirements pertaining to the authorized use of APRS. Upon receiving the registration request to open an APRS account, BIS would send a confirmation email to the account administrator and also verify the account administrator's credentials. If the request for opening an account to access APRS is approved by BIS, a second email would be sent to the account administrator with a password reset link for logging into the APRS account.

Following BIS's approval of the registration request for an APRS account, the account administrator would be authorized to add or remove individual users, who would be able to use the account to view, add, edit and

submit AP reports to BIS on behalf of the person or location with whom the account administrator's registration is affiliated. In addition, the account administrator would be authorized to designate other individual users to act as an account administrator on behalf of the same person or location. Any individual user so designated would possess all the authority of an account administrator for that person or location. Account administrators also would be able to deactivate the account of an individual user or reactivate the account of a previously deactivated individual user.

For persons and locations that have previously submitted a report pursuant to the APR, BIS would notify the AP report point of contact (POC), via email, indicating the date on which electronic submission of AP reports under APRS would become mandatory and instructing the POC or designated organization administrator on how to register on the APRS login page, at *https://www.ap.gov/XXXX,* to request the creation of an account in APRS. This email also would describe how to use APRS, including the roles of the account administrator and individual users (as proposed in § 782.6 ''Registering for electronic submission of Additional Protocol reports'').

As a result of these proposed amendments to §§ 782.5 and 782.6 of the APR, all reports required under the APR would have to be submitted electronically using APRS, instead of manually, as is currently the case. However, the information collected and reported electronically under APRS would be the same type of information that is currently required to be submitted using paper AP report forms. BIS expects that the implementation of APRS would, over time, reduce industry's processing times and errors (*e.g.,* through APRS's copy feature, the ability of users to update personal contact information, and the relative ease of use compared with the current manual reporting system).

Part 783 (Civil Nuclear Fuel Cycle-Related Activities Not Involving Nuclear Materials)

This rule proposes to amend § 783.1 (Reporting Requirements) to include a number of specific references to the mandatory APRS electronic registration and reporting requirements described in §§ 782.5 and 782.6, as proposed to be amended by this rule. BIS also is proposing a similar conforming change in the introductory text of § 783.4 (Deadlines for Submission of Reports).

II. Clarification of Reportable Hard-Rock Mining and Ore Beneficiation Activities

To clarify the types of uranium hard-rock mines and ore beneficiation plants that are subject to the reporting requirements of the APR and to ensure that the description of these mines and plants in the APR is consistent with the terminology used in the Additional Protocol, this rule proposes to amend § 781.1 of the APR by: (1) Adding a definition for ''*Uranium Hard-Rock Mine (Decommissioned);*'' (2) revising the definitions of ''*Uranium Hard-Rock Mine (Closed-down)*'' and ''*Uranium Hard-Rock Mine (Operating);*'' and (3) removing the definition of ''*Uranium Hard-Rock Mine (Suspended).*''

The proposed addition of the definition ''*Uranium Hard-Rock Mine (Decommissioned)*'' reflects the use of the term ''decommissioned'' in a manner similar to its use in the Additional Protocol to describe certain ''facilities'' or ''locations outside facilities.'' As proposed in this rule, the definition of ''*Uranium Hard-Rock Mine (Decommissioned)*'' refers to ''a uranium hard-rock mine or ore beneficiation (concentration) plant where all of the structures and equipment essential for ore operations have been removed and the location can no longer be used to extract or process ore.''

The proposed changes to the definition of ''*Uranium Hard-Rock Mine (Closed-down)*'' are intended to make this definition more closely reflect the use of the term ''closed-down'' as it is applied to describe certain ''facilities'' or ''locations outside facilities'' in the Additional Protocol. Specifically, this rule proposes to revise the definition of ''*Uranium Hard-Rock Mine (Closed-down)*'' to mean ''a uranium hard-rock mine or ore beneficiation (concentration) plant where all ore operations have ceased, but the structures and equipment essential for ore operations have not been decommissioned.'' Consequently, the definition of ''*Uranium Hard-Rock Mine (Closed-down),*'' as proposed to be revised by this rule, would replace the definition of ''*Uranium Hard-Rock Mine (Suspended),*'' which would be removed because the term ''suspended'' neither appears, nor is described, in any of the definitions in the Additional Protocol.

This rule also proposes to revise the definition of ''*Uranium Hard-Rock Mine (Operating),*'' consistent with the definitions described above, to mean ''a uranium hard-rock mine or ore beneficiation (concentration) plant where ore is extracted or processed on a routine basis.'' This proposed change would not, in any way, affect the scope or substance of this definition. Instead, it would clarify that the uranium hard-rock mining activities subject to the reporting requirements in the APR may include ore beneficiation (concentration) activities, in addition to the actual extraction of natural deposits from the ground—see § 781.1 of the APR, definition of ''*Uranium Hard-Rock Mine,*'' paragraph (3).

In addition, this rule proposes to amend the APR to make conforming changes to the ''*Initial Report*'' requirements in § 783.1(a)(3) and the annual reporting requirements in § 783.1(b)(3)(iii), consistent with the amendments to the uranium hard-rock mine definitions described above.

III. Removal of *Initial Report* Requirements Covering Calendar Year 2008 Activities

This rule proposes to amend § 783.1(a) introductory text and (a)(3), § 783.4(a) and Supplement No. 1 to part 783 of the APR to remove references to calendar year 2008 activities (including the due date for reporting such activities) from the *Initial Report* requirements. This change is proposed on the basis that the *Initial Report* requirements in the APR that are specific to calendar year 2008 activities address reportable activities that took place on or before the October 31, 2008, effective date of the APR final rule (73 FR 65120) and therefore were required to have been reported to BIS no later than December 1, 2008. Consequently, these *Initial Report* requirements for calendar year 2008 are no longer necessary. However, this rule does not propose to change the current requirement that reports for activities commencing after the October 31, 2008, effective date of the APR final rule must be submitted to BIS no later than January 31 of the year following any calendar year in which the activities began.

IV. Supplemental Information Report To Replace Amended Report as Means To Notify BIS of Changes to Information Contained in Previously Submitted AP Reports

This rule proposes to amend § 783.2 of the APR by replacing the current *Amended Reports* requirements with a requirement to report changes to reportable activities or location information contained in a person's or location's most recent AP report through the submission of a Supplemental Information Report (Form AP–15) to BIS via APRS. This change is proposed on the basis that the Additional Protocol Annual Update Declaration is

comprised of an aggregate of data based on reports from locations and sites, as well as reports from other U.S. Government agencies. All of the information contained in the U.S. Declaration must undergo interagency review and clearance (referred to as ''vetting'') before the Declaration can be submitted to the IAEA. The compilation of the reports and the interagency vetting process takes place once each year. Similarly, any information contained in *Amended Reports* also must be vetted before submission to the IAEA. BIS has determined that, under the current procedures, the information contained in *Amended Reports* generally cannot be processed in time to be included when the U.S. Declaration is submitted to the IAEA, and that it is not practical to submit such information to the IAEA afterwards (*i.e.,* separately from the U.S. Declaration). Consequently, the proposed APRS would not be designed to provide for the submission of *Amended Reports.* Instead, BIS proposes to amend § 783.2 to require that APRS account administrators and individual users notify BIS of changes to reportable activities and organization and location information contained in their most recent AP reports by submitting these changes to BIS in a *Supplemental Information Report* (Form AP–15) via APRS, as provided in §§ 782.5 and 782.6 of the APR, thereby ensuring that BIS would continue to have timely access to such information for purposes of meeting its responsibilities under the APR.

To reflect the elimination of the *Amended Report* requirements from the APR, this rule proposes to amend § 782.1 (Overview of reporting requirements) to remove the reference to submitting *Amended Reports* to BIS. Because the overview in § 782.1 already references the *Supplemental Information Report* (which would be submitted to BIS to indicate changes to reportable activities and organization and location information, under the circumstances described above), no additional change to the text in this section is proposed by this rule, in this regard. In addition, BIS proposes to amend § 783.4 (Deadlines for submission of reports) by: (1) Revising the introductory text to remove all references to *Amended Reports;* (2) revising paragraph (e) to indicate that a *Supplementary Information Report* must be submitted to BIS either in response to a written notification from BIS, following its receipt of a specific request from the IAEA, or to report changes to information contained in a location's most recent AP report; and (3) removing paragraph (f), which currently addresses *Amended Reports.* Supplement No. 1 to part 783 (Deadlines for Submission of Reports) is proposed to be amended to remove the row in the table that currently addresses the AP forms and due dates for submission of *Amended Reports* to BIS and to revise the row in the table that addresses the AP forms and due dates for *Supplemental Information Reports* to reference the requirement that Form AP–15 must be submitted to BIS within 30 calendar days after any of the following: (1) The receipt of a post-complementary access letter from BIS; (2) the discovery of an error or omission in activity information in the location's most recent AP report; or (3) a change in company information or in ownership of the location. Also, § 784.6 (Post complementary access activities) is proposed to be amended by revising the parenthetical at the end of the section to remove the reference to *Amended Report* requirements.

V. Miscellaneous Amendments to the APR

Section 782.4(a)(1) of the APR, which addresses the submission of activity determination requests to BIS, is proposed to be amended to remove and replace the current email address identified therein (*i.e., apdr@bis.doc.gov*) with the email address *aprp@bis.doc.gov.* Section 782.4(b) is proposed to be amended to clarify the procedures for obtaining verbal or written guidance from BIS concerning other requirements in the APR—these changes would include, *inter alia,* updates to the instructions on how to submit requests for written guidance from BIS.

Supplement No. 1 to part 783 of the APR is proposed to be amended to clarify, within the text identifying the due date for *Annual Update Reports,* the circumstances under which such reports must be submitted.

The legal authorities for 15 CFR parts 781 through 786 are revised by removing the reference to the applicable public law (*i.e.,* the United States Additional Protocol Implementation Act of 2006, Pub. L. No. 109–401) and the U.S. Statutes at Large citation therefor (*i.e.,* 120 Stat. 2726 (December 18, 2006)), consistent with the requirements of *Document Drafting Handbook* (Office of the Federal Register). Because the Additional Protocol Implementation Act has been codified, the relevant provisions of the United States Code (*i.e.,* 22 U.S.C. 8101–8181) are the only statutory authority that needs to be cited.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including: Potential economic, environmental, public health and safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits and of reducing costs, harmonizing rules, and promoting flexibility. This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

2. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid OMB Control Number. This rule contains the following collection of information subject to the requirements of the PRA. This collection has been approved by OMB under control number 0694–0135 (Additional Protocol to the U.S.—International Atomic Energy Agency Safeguards). The approved information collection under OMB control number 0694–0135 for submitting Additional Protocol (AP) reports by Department of Commerce (DOC) and Nuclear Regulatory Commission (NRC) locations and NRC sites, as required by the Additional Protocol Regulations (APR), carries a total burden estimate of 920.3 hours per annum. The total burden under this information collection for DOC and NRC locations is estimated to be 390.2 hours per annum. The total burden under this information collection for NRC sites is estimated to be 530.1 hours per annum. These total estimated burden hours carry a burden estimate ranging between as few as 23 minutes and as much as 6 hours, per response, and are based upon the sum of the number of forms submitted for each activity multiplied by the estimated average number of hours needed to complete each type of report form (the estimated average number of hours, per each type of report, is based on the responses provided by persons, locations and sites to a survey conducted by BIS's Office of Strategic Industries and Economic Security). The total estimated burden hours also include the time for reviewing instructions, searching existing data sources, gathering and

maintaining the data needed, and completing and reviewing the collection of information.

The estimated annual cost to all respondents (locations and sites) of preparing and submitting the reports required under the APR is $42,054. The cost per hour for the respondents was derived from the cost per hour of the salaries and overhead of the Federal employees working on this project. Thus, the estimated total annual cost burden to all respondents for these activities is 920.3 hours × $38.08/hour (GS–13 Step 1) × 1.2 (20% Overhead) = $42,054.

This approved information collection also involves a recordkeeping requirement of three years, as specified in § 786.2 of the APR. The estimated recordkeeping cost for this collection is $675. Each AP report submitted to BIS averages around 25 pages of supporting documents that can be stored in a filing cabinet occupying 0.15 square feet of office space. The average estimated cost of office space in the Washington, DC area is around of $45/sq. ft./year. Applying this cost to the approximately 100 respondents, per annum, who submit AP reports to BIS yields an estimated annual recordkeeping cost for this information collection of $675 (0.15 sq.ft. × $45/sq.ft. × 100 reports).

The estimated total annual cost to all locations and sites of preparing and submitting their AP reports to BIS, together with the recordkeeping costs associated with these reports, is $42,729 [$42,054 (annual cost of preparing and submitting AP reports) + $675 (annual cost of complying with the APR recordkeeping requirements associated with these reports) = $42,729.]

Although this rule proposes to replace the current method of manually submitting AP reports (*e.g.,* via facsimile, hand delivery, courier, or the mail using paper forms) with a mandatory internet-based system (*i.e.,* the APRS) for the electronic submission of such reports, BIS believes that the total impact (*i.e.,* in terms of costs and burden hours) on those persons, locations or sites subject to this reporting requirement would be minimal if implemented in a final rule. Specifically, BIS expects that the burden hours associated with this approved collection would remain essentially unchanged, at least in the short term, due to the one-time additional burden that persons, locations or sites would incur as a result of switching over from the current manual AP reporting system to the internet-based APRS. Consequently, the immediate effect of this proposed change to the AP reporting system would fall well within the existing burden estimate currently associated with OMB control number 0694–0135 (*i.e.,* rounded to 920 burden hours). However, once persons, locations or sites have completed the initial setup phase for APRS, BIS expects there to be at least a modest reduction in the total burden hours associated with this information collection. Although the information collected and reported electronically under APRS would be the same information that is currently required to be submitted using paper AP report forms, BIS expects that the implementation of APRS would reduce industry's processing times and errors (*e.g.,* through the APRS's copy feature and the ability to update personal contact information, as well as the relative ease of use compared with the current manual reporting system).

Written comments and recommendations for the information collection referenced above should be sent within 30 days of the publication of this final rule 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.

3. This rule does not contain policies with federalism implications as that term is defined in Executive Order 13132.

4. The provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, the opportunity for public participation, and a delay in effective date, are inapplicable because this regulation involves a military and foreign affairs function of the United States (see 5 U.S.C. 553(a)(1)). Notwithstanding, BIS believes this rule would benefit from public comment prior to issuance. Consistent with the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) (5 U.S.C. 601 *et seq.*), BIS has prepared the following initial regulatory flexibility analysis (IRFA) of the impact that this proposed rule, if adopted, would have on small businesses.

Description of the Reasons Why Action Is Being Considered

The policy reasons for issuing this proposed rule are discussed in the background section of the preamble of this document and, consequently, are not repeated here.

Statement of the Objectives of, and Legal Basis for, the Proposed Rule; Identification of All Relevant Federal Rules Which May Duplicate, Overlap or Conflict With the Proposed Rule

The objective of the amendments proposed by this rule is to facilitate the compliance of locations and sites who have reporting requirements under the APR by implementing the Additional Protocol Reporting System (APRS), an internet-based application designed for industry to use in preparing and submitting reports required by the APR. The legal basis for this proposed rule is as follows: 22 U.S.C. 8101–8181; Executive Order 13458 (February 4, 2008).

No other federal rules duplicate, overlap, or conflict with this proposed rule.

Number and Description of Small Entities Regulated by the Proposed Action

This proposed rule would apply to locations and sites who are engaged in certain civil nuclear fuel cycle-related activities that are not regulated by the NRC, or its domestic Agreement States, and are not situated at certain U.S. government locations. The APR require that such activities be reported to BIS, and also contain requirements concerning the conduct of on-site activities in conjunction with IAEA complementary access to locations where such civil nuclear fuel cycle-related activities take place. Currently, these reports are submitted to BIS via facsimile, hand delivery, courier, or the mail using paper forms. This rule proposes to amend the APR to replace the existing manual reporting and processing procedures with a mandatory requirement to submit reports and other documents through an on-line application known as the Additional Protocol Reporting System (APRS).

BIS does not collect or maintain the data necessary to determine how many of the affected persons or locations are small entities as that term is used by the Small Business Administration. However, BIS does maintain data on the number of AP reports that the agency receives, annually, in response to the reporting requirements of the APR, and is using these data as a means of assessing the impact that the changes proposed in this rule would have on small businesses.

Based on the data provided for calendar year 2019, in BIS's most recent Supporting Statement for the information collection approved under OMB control number 0694–0135, there are approximately 300 AP report forms

submitted to BIS, per annum, in accordance with the requirements of the APR. Specifically, the number of AP report forms submitted to BIS by Department of Commerce (DOC) locations for reportable activities during calendar year 2019 was approximately 115 forms. Nuclear Regulatory Commission (NRC) locations submitted approximately 85 AP report forms to BIS for their 2019 reportable activities, while NRC sites submitted approximately 108 AP report forms. Based on these data, the actual total number of AP report forms submitted to BIS was slightly in excess of 300 forms for reportable 2019 activities [115 (forms submitted by DOC locations) + 85 (forms submitted by NRC locations) + 108 (forms submitted by NRC sites) = 308 total AP report forms].

The aforementioned BIS Supporting Statement and the information collection approved under OMB control number 0694–0135 estimate the total number of AP reports submitted to BIS per annum, instead of indicating the estimated number of entities (*i.e.,* persons having locations or sites subject to the reporting requirements in the APR) who must submit such reports each year. However, the total number of such entities would be less than the total number of AP reports submitted per annum. This is because a significant number of entities submit more than one type of AP report to BIS per annum. In its 2008 Supporting Statement for the information collection approved under OMB 0694–0135, BIS estimated that 129 entities, annually, would submit AP reports. Based on actual reporting data compiled by BIS since 2008, BIS now estimates that approximately 100 entities, annually, would be affected by the changes proposed by this rule.

As indicated in the preamble of this proposed rule, participation in APRS would be mandatory only for those entities having one or more locations or sites subject to the reporting requirements described in § 738.1 of the APR. For location and site information that is subject to the AP reporting requirements in the NRC's regulations (*i.e.,* information concerning exports of nuclear facilities and equipment and non-nuclear materials as submitted per 10 CFR 110.54(a), facility information described in 10 CFR 75.10(b)(5) and submitted per 10 CFR 75.6(c) and 75.10(e), and location information described in 10 CFR 75.11(b) and submitted per 10 CFR 75.6(d) and 75.11(c)), participation in APRS would be optional. Nevertheless, for purposes of this analysis, and to ensure that the potential impact of the proposed changes in this rule on small entities is not underestimated, BIS estimates that there would be approximately 100 entities having locations or sites that would be affected by the changes to the APR reporting requirements proposed by this rule.

Although BIS estimates that the majority of these entities are substantially sized entities, having more than 500 employees, BIS does not have sufficient information on these businesses and organizations to definitively characterize them as large entities. The Small Business Administration (SBA) has established standards for what constitutes a small business, with respect to each of the Standard Industrial Classification (SIC) code categories. For example, a business in the uranium mining industry (NAICS Code: 212291, SIC Code: 1094), is considered by SBA to be a small business if it is independently owned and operated and not dominant in its field of operation and it employs 500 or fewer persons on a full-time basis, part-time, temporary, or other basis. The Mine Safety and Health Administration (MSHA) estimates that approximately 99.8% of the metal/non-metal mining industry would qualify as small businesses. However, many of the uranium mining and milling entities in the United States appear to be subsidiaries of large companies and BIS estimates that most of the small entities likely to be impacted by the AP reporting changes proposed by this rule would fall within one of the following categories: (1) Colleges and universities; (2) nuclear fuel manufacturers and utility companies; or (3) corporate entities and contractors involved in research and development, manufacturing, assembly and construction activities. In addition, BIS is not able to determine which SIC code categories apply to other locations or sites that are likely to be impacted by the AP reporting changes proposed by this rule. Therefore, for the purpose of assessing the impact of this proposed rule, BIS assumes that all of the approximately 100 entities having locations and sites that are likely to be affected by the proposed changes are small entities. Although this proposed rule would likely affect a substantial number of small entities (*i.e.,* approximately 100 entities having such locations and sites), the implementation of APRS is not expected to have a significant economic impact on these entities.

As indicated in the PRA analysis for this rule (see Rulemaking Requirements #2, above), the total estimated annual burden hours for preparing and submitting AP reports to BIS is 920.3 hours and the total estimated annual cost is $42,054 [920.3 hours × $38.08/hour (GS–13 Step 1) × 1.2 (20% Overhead) = $42,054]. In addition, BIS estimates that the total annual cost to locations and sites for satisfying the recordkeeping requirement of three years, as specified in § 786.2 of the APR, is $675 (see the PRA analysis in Rulemaking Requirements #2, above).

The total estimated annual burden hours required to comply with the AP reporting and recordkeeping requirements described above would be 920 burden hours and the total estimated annual cost would be $42,729. Although the primary impact of these new requirements would affect a substantial number of small entities (*i.e.,* approximately 100 entities having locations or sites subject to the reporting requirements in the APR), the total economic impact on the affected entities (*i.e.,* $42,729 per annum, for all of the affected entities) would not be significant. The average impact per entity would be slightly more than $427 (*i.e.,* $42,729 ÷ 100) per annum, which represents a small percentage of the net annual revenue of a typical small business.

Based on the analysis provided above, the amendments proposed in this rule would not impose a significant economic impact on a substantial number of small businesses.

Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule

The changes proposed in this rule, if adopted, would mean that the AP reports required under § 783.1 of the APR, which currently must be submitted to BIS via facsimile, hand delivery, courier, or the mail using paper forms, would have to be submitted electronically to BIS using APRS. Neither the scope nor the type of information that would have to be reported to BIS would be affected by these proposed changes. In addition, although the changes proposed by this rule might result in more records being maintained electronically than is currently the case, the scope of the recordkeeping requirements described in § 786.2 of the APR would not be affected as a result of the changes proposed by this rule.

Furthermore, this proposed mandatory APRS electronic submission requirement would apply only to those locations and sites subject to the BIS administered reporting requirements described in § 783.1 of the APR. Locations and sites whose information is subject to the AP reporting requirements in the NRC's regulations

(as described above, under the subheading ''*Number and Description of Small Entities Regulated by the Proposed Action*''), would not be subject to this proposed APRS requirement. Consequently, locations and sites that are subject to these NRC regulations would have the option of continuing to submit their AP reports to BIS manually or registering for access to submit their reports electronically to BIS via APRS (provided that the locations and sites otherwise satisfy their NRC reporting requirements).

To the extent that compliance with the changes proposed in this rule would impose a burden on entities, including small businesses, BIS believes the burden would be minimal. As indicated in the above analysis of the description and number of small entities likely to be affected by these proposed changes, these new APRS submission requirements would affect a substantial number of small entities (*i.e.,* approximately 100 entities having locations or sites subject to the reporting requirements in the APR), but the total economic impact on the affected entities (*i.e.,* $42,729 per annum, for all of the affected entities) would not be significant. The average impact per entity would be slightly more than $427 (*i.e.,* $42,729 ÷ 100) per annum, which represents a small percentage of the net annual revenue of a typical small business. In addition, once these entities have completed the initial setup phase (including registration) for using APRS to submit their AP reports, BIS expects there to be at least a modest reduction in the total burden hours associated with the information collection approved under OMB control number 0694–0135. Although the information collected and reported electronically under APRS would be the same information that is currently required to be reported via facsimile or using paper AP report forms, BIS anticipates that the implementation of APRS would reduce industry's processing times and errors (*e.g.,* through the APRS's copy feature and the ability to update personal contact information, as well as the relative ease of use compared with the current manual reporting system).

Significant Alternatives and Underlying Analysis

As noted above, BIS does not believe that the amendments proposed in this rule, if implemented in a final rule, would have a significant economic impact on small businesses. Nevertheless, as required by 5 U.S.C. 603(c), BIS considered significant alternatives to these proposed amendments to assess whether the alternatives would: (1) Accomplish the stated objective of this rule (*i.e.,* to facilitate the compliance of locations and sites with the reporting requirements in the APR); and (2) minimize any significant economic impact of this rule on small entities.

BIS could have proposed more extensive changes to the reporting requirements in the APR to further facilitate compliance of affected locations and sites with these requirements. However, the changes proposed by this rule should be viewed in light of the fact that BIS's discretion in addressing the reporting requirements of the APR is limited by the necessity of meeting U.S. obligations under the Additional Protocol. The Additional Protocol specifies the information that the United States must declare to the IAEA. Nevertheless, in addressing these requirements in this proposed rule, BIS has attempted to minimize the recordkeeping and reporting burden by: (1) Ensuring that only information that the United States must declare to the IAEA will have to be reported to BIS; and (2) making the process by which this information must be submitted to BIS as seamless as possible (*e.g.,* in terms of ease of use and costs) for affected locations and sites.

BIS is not proposing different compliance or reporting requirements for small businesses. If a small business is subject to a reporting requirement under the APR, then it would submit an AP report using the same process as any other company (*i.e.,* electronically via APRS). This submission process is free of charge to all entities, including small businesses. In addition, the resources made available by BIS to locations and sites subject to the reporting requirements in the APR (*e.g.,* the procedures for requesting assistance from BIS, as described in § 782.4 of the APR, and the AP website maintained by BIS at *https://www.bis.doc.gov/index.php/other-areas/additional-protocol-ap,* which would be updated to address the proposed mandatory APRS requirements) typically serve to lessen the impact of these requirements on small businesses.

Lastly, as required under 5 U.S.C. 603(c), BIS assessed the use of performance standards rather than design standards and also considered whether an exemption for small businesses was practical under the circumstances (*i.e.,* within the context of the changes proposed in this rule).

This rule proposes the establishment of a mandatory internet-based AP reporting submission requirement (*i.e.,* APRS) for entities having locations or sites subject to the reporting requirements in the APR, in lieu of providing other options for submitting these reports, because BIS anticipates that the implementation of APRS would provide the most effective approach for reducing industry's processing times and errors (*e.g.,* through the APRS's copy feature and the ability to update personal contact information, as well as the relative ease of use compared with the current manual reporting system). After initially implementing an AP reporting system based on the submission of reports via facsimile, hand delivery, courier, or the mail using paper forms, BIS concluded that an electronic AP reporting system based on specific design standards would be the most appropriate way to achieve these objectives. Furthermore, the approach proposed in this rule would facilitate compliance with these AP reporting requirements while, at the same time, reducing the cost to locations and facilities of such compliance, over the long term.

This rule does not propose to exempt small businesses from the requirement to use APRS to submit their AP reports, because BIS and its interagency partners have determined that this new electronic submission process will facilitate the efforts of locations and sites to submit their AP reports to BIS by providing an approach that would be less time consuming and more cost effective, irrespective of the size of the entity. This approach also would ensure more timely and accurate reporting of the information needed by BIS to prepare the U.S. declaration for submission to the IAEA. Consequently, an exemption for small businesses would undermine the effectiveness of the changes proposed by this rule.

Conclusion

Although BIS has determined that the provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, the opportunity for public participation, and a delay in effective date, are inapplicable because this regulation involves a military and foreign affairs function of the United States (see 5 U.S.C. 553(a)(1)), BIS believes that this rule would benefit from public comment, prior to issuance, and has prepared this initial regulatory flexibility analysis (IRFA), consistent with the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), of the impact that this proposed rule, if adopted, would have on small businesses.

Please submit any comments concerning this IRFA in accordance

with the instructions provided in the **ADDRESSES** section of this proposed rule.

List of Subjects

15 CFR Part 781

Imports, Nuclear energy, Reporting and recordkeeping requirements, Treaties.

15 CFR Parts 782 and 786

Nuclear energy, Reporting and recordkeeping requirements.

15 CFR Parts 783 and 784

Imports, Nuclear energy, Reporting and recordkeeping requirements.

15 CFR Part 785

Administrative practice and procedure.

For the reasons stated in the preamble, parts 781 through 786 of the Additional Protocol Regulations (15 CFR parts 781–786) are proposed to be amended as follows:

PART 781—[AMENDED]

■ 1. The authority citation for 15 CFR part 781 is revised to read as follows:

Authority: 22 U.S.C. 8101–8181; Executive Order 13458 (February 4, 2008).

■ 2. Section 781.1 is amended:
■ a. By adding, in alphabetical order, the definition for ''Additional Protocol Reporting System (APRS)'';
■ b. By revising the definition of ''Uranium Hard-Rock Mine (Closed-down)'';
■ c. By adding, in alphabetical order, the definition for ''Uranium Hard-Rock Mine (Decommissioned)'';
■ d. By revising the definition of ''Uranium Hard-Rock Mine (Operating)''; and
■ e. By removing the definition of ''Uranium Hard-Rock Mine (Suspended)''.

The additions and revisions read as follows:

§ 781.1 Definitions of terms used in the Additional Protocol Regulations (APR).

* * * * *

Additional Protocol Reporting System (APRS). The automated tool for persons or locations to submit electronic AP reports on nuclear fuel cycle related activities to BIS via the internet.

* * * * *

Uranium Hard-Rock Mine (Closed-down). A uranium hard-rock mine or ore beneficiation (concentration) plant where all ore operations have ceased, but the structures and equipment essential for ore operations have not been decommissioned.

Uranium Hard-Rock Mine (Decommissioned). A uranium hard-rock mine or ore beneficiation (concentration) plant where all of the structures and equipment essential for ore operations have been removed and the location can no longer be used to extract or process ore.

Uranium Hard-Rock Mine (Operating). A uranium hard-rock mine or ore beneficiation (concentration) plant where ore is extracted or processed on a routine basis.

* * * * *

PART 782—[AMENDED]

■ 3. The authority citation for 15 CFR part 782 is revised to read as follows:

Authority: 22 U.S.C. 8101–8181; Executive Order 13458 (February 4, 2008).

■ 4. Section 782.1 is revised to read as follows:

§ 782.1 Overview of reporting requirements under the APR.

Part 783 of the APR describes the reporting requirements for specified activities. For each activity identified in part 783, BIS may require that an *Initial Report,* an *Annual Update Report,* a *No Changes Report,* an *Import Confirmation Report* or a *Supplemental Information Report* be submitted to BIS. In addition, persons and locations subject to the APR may be required to provide BIS with information needed to assist the IAEA in clarifying or verifying information specified in the U.S. declaration or in clarifying or amplifying information concerning the nature of the activities conducted at a location (see §§ 783.1(d)(1) and 784.1(b)(2) of the APR for *Supplemental Information Report* requirements). If, after reviewing part 783 of the APR, you determine that you are subject to one or more reporting requirements, you must submit an electronic AP report to BIS via the Additional Protocol Reporting System (APRS) (see § 782.6 of the APR for instructions on how to register on-line with BIS to submit electronic reports under APRS).

■ 5. Section 782.4 is amended:
■ a. By revising the section heading;
■ b. By revising the heading of paragraph (a); and
■ c. By revising paragraphs (a)(1) and (b).

The revisions read as follows:

§ 782.4 Requesting assistance from BIS to determine your AP reporting obligations.

(a) *Activity determination requests.* (1) If you need assistance in determining whether or not your activity is subject to the reporting requirements in the APR, submit your written request for an activity determination to BIS. Such requests may be submitted to BIS electronically, via facsimile to (202) 482–1731 or by email to *aprp@bis.doc.gov,* or in hard copy by hand delivery, courier or the mail to the following address: Treaty Compliance Division, Bureau of Industry and Security, U.S. Department of Commerce, Attn: AP Activity Determination Request, 14th Street and Pennsylvania Avenue NW, Room 4515, Washington, DC 20230. Your activity determination request should include the information described in paragraph (a)(2) of this section to ensure an accurate determination. Also include any additional information that would be relevant to the activity described in your request. If you are unable to provide all of the information required in paragraph (a)(2) of this section, you must include an explanation identifying the reasons that preclude you from supplying such information to BIS. If BIS cannot make a determination based upon the information submitted with your request, BIS will send you written notification identifying the type of information required to complete the activity determination. BIS will provide a written response to your activity determination request, or send you written notification to submit additional information, within 10 business days of receipt of the request.

* * * * *

(b) *Other requests for assistance*—(1) *Telephone inquiries.* If you need guidance in interpreting additional provisions of the APR, including APRS registration and reporting requirements, or need assistance with complementary access issues, you may contact BIS's Treaty Compliance Division, by phone, at (202) 482–1001.

(2) *Advisory opinion requests.* If you wish to obtain a written response from BIS to an inquiry, you must submit a detailed written request to BIS that identifies the specific type of guidance or assistance needed. Submit your written request to BIS via facsimile or email, or in hard copy, in accordance with the instructions provided for the submission of AP activity determination requests in paragraph (a)(1) of this section, and also include contact information as specified in paragraph (a)(2) of this section. To ensure that your request is properly routed, include the notation, ''ATTENTION: AP Advisory Opinion Request,'' on your submission to BIS. If BIS is unable to provide guidance or assistance based upon the information submitted with your request, BIS will send you written notification identifying the type of information required for BIS to respond to your request.

■ 6. Sections 782.5 and 782.6 are revised to read as follows:

§ 782.5 Requirement to submit AP reports to BIS via the internet using APRS.

Persons and locations subject to the reporting requirements described in § 783.1 of the APR must submit their Additional Protocol (AP) reports to BIS via the internet, using their Additional Protocol Reporting System (APRS) account. Changes to information submitted by reportable locations in their most recent AP reports also must be submitted to BIS, via APRS, in accordance with the instructions provided in § 783.2 of the APR. Section 782.6 of the APR describes how to register for an APRS account. BIS will provide persons and locations subject to the AP reporting requirements with information on how to use APRS (including the roles of the account administrator and individual users and how to electronically file AP reports with BIS) as part of the APRS registration process. The specific AP Forms required to submit these reports, including due dates, are indicated in supplement no. 1 to part 783 of the APR. AP Forms may be accessed via the location's APRS account. For additional information on how to prepare and submit AP reports, see the ''*Additional Protocol Reporting System (APRS) User Manual,*'' which is located on the ''Additional Protocol (AP)'' website maintained by BIS, at: *https://www.bis.doc.gov/index.php/other-areas/additional-protocol-ap-XX.*

§ 782.6 Registration requirement for electronic submission of Additional Protocol reports.

(a) *Scope.* This section describes the procedures for registering to submit electronic Additional Protocol (AP) reports to BIS. The procedures in this section apply to the submission of AP reports (as described in part 783 of the APR) from persons and locations in the United States with reportable activities.

(b) *Registering to use BIS's Additional Protocol Reporting System (APRS).* Each person or location with reportable activities under the APR is required to designate at least one individual authorized to act on behalf of that person or location as an APRS account administrator. The account administrator is responsible for registering to open an account in APRS for the purpose of submitting AP reports to BIS on behalf of the person or location. To register for an account in APRS, the account administrator must visit the APRS login page, at *http://www.ap.gov/XXXX,* and provide the following information to BIS: The name of the company or organization, location name, personal information including mailing address, telephone number, facsimile number, and primary and secondary email addresses. Account administrators must certify that they will abide by the requirements of the APR, including all requirements and procedures applicable to the authorized use of APRS. After receiving the account administrator's registration request, BIS will send a confirmation email to the account administrator. Once BIS has verified the account administrator's credentials and granted access to APRS, BIS will send the account administrator another email containing a password reset link for logging into APRS.

(c) *Role of the account administrator.* The account administrator, who serves as the authorized representative of the person or location subject to reporting requirements under the APR, may designate individual users to have access to the APRS account to view, add, edit and submit AP reports to BIS on behalf of the same reportable person or location. The account administrator may designate an individual user to also act as an account administrator on behalf of the same person or location—any individual user so designated will also have the authority of an account administrator for that person or location. The account administrator also may deactivate the account of an individual user, including an individual user who is acting as an account administrator, or reactivate the account of a previously deactivated individual user or account administrator.

(d) *Role of the individual user.* An individual user designated in accordance with the requirements of paragraph (c) of this section may view, add, edit and submit reports required by part 783 of the APR.

(e) *Authorization to submit AP reports to BIS.* BIS may reject an electronic submission if it has reason to believe that the account administrator or individual user making the submission lacks the authority to do so. However, BIS is not obligated to verify that an account administrator or individual user has the necessary authorization to submit AP reports to BIS on behalf of a particular person or location and generally will treat account administrators and individual users as acting within their authority, in the absence of clear evidence to the contrary. When an individual user is no longer authorized to submit AP reports to BIS on behalf of a particular person or location, an account administrator for that person or location must act, promptly, to remove the individual user's access to the APRS account.

(f) *Requirement to update (or otherwise maintain the accuracy of) APRS account information*—(1) *Locations.* Account administrators must contact BIS via email, at *aprp@bis.doc.gov,* to update the location information associated with their APRS account (*e.g.,* company or organization name, mailing address, email address, and telephone and facsimile numbers) to ensure that such information remains current and accurate. (Also see § 783.2(b) of the APR for instructions on how to notify BIS, via APRS, if there are changes to reportable location information, including whether a reportable location is sold or purchased, or has gone out of business, since submission of its most recent *Initial Report, Annual Update Report,* or *No Changes Report* to BIS.)

(2) *Account administrators.* Account administrators must update their personal information (*e.g.,* name, telephone number, facsimile number and email address) as necessary, via the *User Profile* in their APRS account, to ensure that such information remains current and accurate.

(3) *Individual users.* Individual users must update their personal information (*e.g.,* name, telephone number, facsimile number and email address) as necessary, via the *User Profile* in their APRS account, to ensure that such information remains current and accurate.

PART 783—[AMENDED]

■ 7. The authority citation for 15 CFR part 783 is revised to read as follows:

Authority: 22 U.S.C. 8101–8181; Executive Order 13458 (February 4, 2008).

■ 8. Sections 783.1 through 783.4 are revised to read as follows:

§ 783.1 Additional Protocol (AP) reporting requirements.

(a) *Initial report.* If you commenced any of the civil nuclear fuel cycle-related activities described in this paragraph (a) at a location for which you have not previously submitted an *Initial Report* to BIS, you must submit an *Initial Report* to BIS no later than January 31 of the year following the calendar year in which these activities commenced (see supplement no. 1 to this part). You may report any of these activities as part of your *Annual Update Report,* in lieu of submitting a separate *Initial Report,* if you also have an *Annual Update Report* requirement for other civil nuclear fuel cycle-related activities described in this paragraph (a) that applies to the same location and covers the same reporting period (see paragraph (b) of this section). In order

to satisfy the *Initial Report* requirements under this paragraph (a), you must complete and submit to BIS Form AP–1, Form AP–2 and other appropriate AP Forms, as specified in this paragraph (a). The appropriate AP Forms must be submitted to BIS via APRS, as provided in §§ 782.5 and 782.6 of the APR.

(1) *Research and development activities not involving nuclear material.* You must submit an *Initial Report* to BIS if you commenced any of the civil nuclear fuel cycle-related research and development activities identified in paragraph (a)(1)(i) or (ii) of this section during the previous calendar year. Activities subject to these reporting requirements include research and development activities related to safe equipment operations for a nuclear fuel cycle-related activity, but do not include activities related to theoretical or basic scientific research or to research and development on industrial radioisotope applications, medical, hydrological and agricultural applications, health and environmental effects and improved maintenance.

(i) You must complete and submit Form AP–3 if you conducted any civil nuclear fuel cycle-related research and development activities defined in § 781.1 of the APR that:

(A) Did not involve nuclear material; and

(B) Were funded, specifically authorized or controlled by, or conducted on behalf of, the United States.

(ii) You must complete and submit Form AP–4 if you conducted any civil nuclear fuel cycle-related research and development activities defined in § 781.1 of the APR that:

(A) Did not involve nuclear material;

(B) Were specifically related to enrichment, reprocessing of nuclear fuel, or the processing of intermediate or high-level waste containing plutonium, high enriched uranium or uranium-233 (where ''processing'' involves the separation of elements); *and*

(C) Were not funded, specifically authorized or controlled by, or conducted on behalf of, the United States.

(2) *Civil nuclear-related manufacturing, assembly or construction activities.* You must submit an *Initial Report* to BIS if you commenced any of the activities specified in supplement no. 2 to this part during the previous calendar year. To report these activities, complete and submit Form AP–5.

(3) *Uranium hard-rock mining and ore beneficiation activities.* You must submit an *Initial Report* to BIS if you commenced operations at a uranium hard-rock mine or an ore beneficiation (concentration) plant during the previous calendar year. This reporting requirement applies not only to the commencement of operations at a location for which you have not previously submitted an *Initial Report* to BIS, but also to the resumption of operations at a mine or ore beneficiation plant that was last reported to BIS as being in ''decommissioned'' status (see § 781.1 of the APR for the definitions of ''uranium hard-rock mine'' and uranium hard-rock mines in ''operating,'' ''decommissioned'' or ''closed-down'' status). To report these activities, complete and submit Form AP–6.

(b) *Annual reporting requirements.* You must submit either an *Annual Update Report* or a *No Changes Report* to BIS if, during the previous calendar year, you continued to engage in civil nuclear fuel cycle-related activities at a location for which you submitted an *Initial Report* to BIS in accordance with the AP reporting requirements described in paragraph (a) of this section.

(1) *Annual Update Report.* You must submit an *Annual Update Report* if you have updates or changes to report concerning either the activities conducted at your location (including the commencement of additional activities) or any information previously submitted on Form AP–1 (other than updates or changes to the certifying official) or Form AP–2 since your most recent report of activities to BIS. When preparing your *Annual Update Report,* you must complete the same AP report forms that you used for submitting your *Initial Report* on these activities and submit them to BIS. However, additional AP report forms will be required if your location engaged in any civil nuclear fuel cycle-related activities described in paragraph (a) of this section that you did not previously report to BIS. The appropriate AP report forms for each type of activity that must be reported are identified in paragraphs (a)(1) through (3) of this section. You must submit your *Annual Update Report* to BIS, via APRS, no later than January 31 of the year following any calendar year in which the activities took place or there were changes to previously reported activities (see supplement no. 1 to this part).

(2) *No Changes Report.* You may submit a *No Changes Report,* in lieu of an *Annual Update Report,* if you have no updates or changes to report concerning either the activities conducted at your location (including the commencement of additional activities) or any information previously reported on Form AP–1 (other than updates or changes to the certifying official) or AP–2 since your most recent report of activities to BIS. In order to satisfy the reporting requirements under this paragraph (b)(2), you must complete Form AP–17 and submit it to BIS, via APRS, no later than January 31 of the year following any calendar year in which there were no changes to previously ''reported'' activities or location information (see supplement no. 1 to this part).

(3) *Additional guidance on annual reporting requirements.* (i) If your *Initial Report* or your most recent *Annual Update Report* for a location indicates that all civil nuclear fuel cycle-related activities described therein have ceased at that location, and no other reportable activities have occurred during the previous calendar year, then you do not have a reporting requirement for the location under paragraph (b) of this section.

(ii) If your location ceases to engage in activities subject to the AP reporting requirements described in paragraph (a) of this section, and you have not previously reported this to BIS, you must submit an *Annual Update Report* covering the calendar year in which you ceased to engage in such activities.

(iii) The decommissioned status of a uranium hard-rock mine or ore beneficiation (concentration) plant must be reported by submitting an *Annual Update Report* to BIS covering the calendar year in which the mine or plant was decommissioned. If you subsequently resume operations at a mine or ore beneficiation plant that was last reported to BIS as being in ''decommissioned'' status, you must submit an *Initial Report* to BIS, as described in paragraph (a)(3) of this section (see § 781.1 of the APR for the definitions of ''uranium hard- rock mine'' and uranium hard-rock mines in ''operating,'' ''decommissioned'' or ''closed-down'' status).

(c) *Import Confirmation Report.* You must complete Forms AP–1, AP–2 and AP–14 for each import of equipment or non-nuclear material identified in supplement no. 3 to this part and submit these forms to BIS, via APRS, if BIS sends you written notification requiring that you provide information concerning imports of such equipment and non-nuclear material. These AP report forms must be submitted within 30 calendar days of the date that you receive written notification of this requirement from BIS (see supplement no. 1 to this part). BIS will provide such notification when it receives a request from the IAEA for information concerning imports of this type of equipment or non-nuclear material. The IAEA may request this information to

verify that you received specified equipment or non-nuclear material that was shipped to you by a person, organization or government from a foreign country.

(d) *Supplemental Information Report*—(1) *IAEA request for amplification or clarification.* You must complete Forms AP–1, AP–2 and AP–15 and submit them to BIS, via APRS, if BIS sends you written notification requiring that you provide information about the activities conducted at your location, insofar as relevant for the purpose of safeguards. These AP report forms must be submitted within 15 calendar days of the date that you receive written notification of this requirement from BIS (see supplement no. 1 to this part). BIS will provide such notification only if the IAEA specifically requests amplification or clarification concerning any information provided in the U.S. Declaration based on your report(s).

(2) *Changes to information previously reported to BIS.* You must complete Form AP–15 and submit it to BIS, via APRS, to report changes to activity information, organization and location information, ownership of organization and changes related to complementary access within 30 calendar days of any such changes (see § 783.2 and Supplement No.1 to this part).

(e) *Reportable location.* A location that must submit an *Initial Report, Annual Update Report* or *No Changes Report* to BIS, pursuant to the requirements of this section, is considered to be a reportable location with declared activities.

§ 783.2 Changes to information in previously submitted AP reports.

In order for BIS to maintain accurate information on previously submitted AP reports, including information necessary for BIS to facilitate complementary access notifications or to communicate that specific AP reporting requirements may apply, changes to information submitted by reportable locations in their most recent AP reports must be reported to BIS under the circumstances described in paragraphs (a), (b), and (d) of this section. This section applies only to changes affecting information contained in *Initial Reports* and *Annual Update Reports* that were submitted to BIS in accordance with the requirements of § 783.1(a) and (b) of the APR. The specific report forms that you must use to prepare and submit such changes will depend upon the type of information that you are required to provide, pursuant to this section. Changes to reportable location information must be submitted to BIS via APRS. For additional guidance on how to submit changes to information contained in previously submitted AP reports, contact BIS's Treaty Compliance Division by phone, at (202) 482–1001, or by email, at *aprp@bis.doc.gov.*

(a) *Changes to activity information.* You must notify BIS within 30 calendar days of the time that you discover an error or omission in your most recent *Initial Report* or *Annual Update Report* that involves information concerning an activity subject to the reporting requirements described in § 783.1(a) or (b) of the APR. Use the *Supplemental Information Report* Form AP–15 to submit these changes to BIS via APRS.

(b) *Changes to organization and location information that must be maintained by BIS*—(1) *Internal organization changes.* You must notify BIS within 30 calendar days of any change in the following information (use *Supplemental Information Report* Form AP–15 to submit your changes to BIS via APRS):

(i) Name of report point of contact (R–POC), including telephone number, facsimile number, and email address;

(ii) Name(s) of complementary access point(s) of contact (A–POC), including telephone number(s), facsimile number(s) and email address(es);

(iii) Organization name;

(iv) Organization mailing address;

(v) Location owner, including telephone number, and facsimile number; *or*

(vi) Location operator, including telephone number, and facsimile number.

(2) *Change in ownership of organization.* You must notify BIS if you sold a reportable location or if your reportable location went out of business since submitting your most recent *Initial Report, Annual Update Report,* or *No Changes Report* to BIS. You must also notify BIS if you purchased a reportable location that submitted an *Initial Report, Annual Update Report,* or *No Changes Report* to BIS for the most recent reporting period, as specified in § 783.1(a) and (b) of the APR. Submit your changes to BIS, via APRS, either before the effective date of the change in ownership or within 30 calendar days after the effective date of the change.

(i) The following information must be submitted to BIS by an organization that is selling or that has sold a reportable location (use *Supplemental Information Report* Form AP–15 to describe your changes and to provide specific details regarding the sale of a reportable location):

(A) Name of seller (*i.e.,* name of the organization selling a reportable location);

(B) Reporting Code (this code is assigned to a reportable location after BIS has approved a request to open an APRS account for the location);

(C) Name of purchaser (*i.e.,* name of the new organization/owner purchasing a reportable location) and name and address of contact person for the purchaser, if known;

(D) Date of ownership transfer or change;

(E) Additional details on the sale of the reportable location relevant to ownership or operational control over any portion of the reportable location (*e.g.,* whether the entire location or only a portion of the reportable location has been sold to a new owner); *and*

(F) Details regarding whether the new owner of a reportable location will submit the next report for the entire calendar year in which the ownership change occurred, or whether the previous owner and new owner will submit separate reports for the periods of the calendar year during which each owned the reportable location.

(ii) The following information must be submitted to BIS by an organization that is purchasing or that has purchased a reportable location (use *Supplemental Information Report* Form AP–15 to describe your changes):

(A) Name of purchaser (*i.e.,* name of the new organization/owner purchasing a reportable location) and name and address of contact person for the purchaser;

(B) Details on the purchase of the reportable location relevant to ownership or operational control over any portion of the reportable location (*e.g.,* whether the purchaser intends to purchase and to maintain operational control over the entire location or only a portion of the reportable location); *and*

(C) Details on whether the purchaser intends to continue existing civil nuclear fuel cycle-related activities at the reportable location or to cease such activities during the current reporting period.

(iii) If the new owner of a reportable location is responsible for submitting a report that covers the entire calendar year in which the ownership change occurred, the new owner must obtain and maintain possession of the location's records covering the entire year, including those records for the period of the year during which the previous owner still owned the property.

NOTE 1 to § 783.2(b): *Information that is submitted to BIS to identify changes*

involving internal organization information or changes in ownership is used only for internal U.S. Government purposes and is not forwarded to the IAEA. BIS uses this information to update contact information for internal oversight purposes and for IAEA complementary access notifications.

NOTE 2 to § 783.2(b): *For ownership changes, the reportable location will maintain its original Reporting Code, unless the location is sold to multiple owners, at which time BIS will assign a new Reporting Code.*

(c) *Non-substantive changes.* If you discover one or more non-substantive typographical errors in your *Initial Report* or *Annual Update Report,* after submitting the report to BIS, you are not required to submit your corrections, separately, to BIS via APRS. Instead, you may correct these errors when you submit your next *Annual Update Report* to BIS.

(d) *Changes related to complementary access.* If you are required to submit additional information to BIS following the completion of complementary access (see part 784 of the APR), BIS will notify you, in writing, of any issues that would require follow-up action on your part, pursuant to § 784.6 of the APR. Complete and submit *Supplemental Information Report* Form AP–15 and/or the specific report forms required by § 783.1(a) or (b) of the APR, according to the type(s) of activities for which information is being requested. You must submit your responses to BIS, via APRS, no later than 30 calendar days following your receipt of BIS's post complementary access letter.

§ 783.3 Reports containing information determined by BIS not to be required by the APR.

If you submit a report and BIS determines that none of the information contained therein is required by the APR, BIS will not process the report and will notify you, either electronically or in writing, explaining the basis for its decision. BIS will not maintain any record of the report. However, BIS will maintain a copy of the notification.

§ 783.4 Deadlines for submission of reports.

Reports required under this part must be submitted to BIS via APRS, as provided in §§ 782.5 and 782.6 of the APR, no later than the appropriate due date indicated in supplement no. 1 to this part. Required reports include those identified in paragraphs (a) through (e) of this section.

(a) *Initial Report:* Submitted by a location that commenced one or more of the civil nuclear fuel cycle-related activities described in § 783.1(a) of the APR during the previous calendar year, but that has not yet reported such activities to BIS. However, you may report any of these activities as part of your *Annual Update Report,* in lieu of submitting a separate *Initial Report,* if you also have an *Annual Update Report* requirement for other civil nuclear fuel cycle-related activities described in § 783.1(a) of the APR that applies to the same location and covers the same reporting period (see § 783.1(b) of the APR and paragraph (b) of this section).

(b) *Annual Update Report:* Submitted by a reportable location—this report describes updates or changes to a location's previously reported activities or information, or the commencement of additional activities at the location, since the location's most recent report to BIS.

(c) *No Changes Report:* Submitted by a reportable location, in lieu of an *Annual Update Report,* when there are no updates or changes to a location's previously reported activities or information, and no new activities to report, since the location's most recent report to BIS.

(d) *Import Confirmation Report:* Submitted in response to a written notification from BIS, following a specific request by the IAEA.

(e) *Supplemental Information Report:* Submitted in response to a written notification from BIS, following a specific request by the IAEA, and to report changes to information submitted to BIS by reportable locations in their most recent AP reports.

■ 9. Supplement No. 1 to part 783 is revised to read as follows:

SUPPLEMENT NO. 1 TO PART 783—DEADLINES FOR SUBMISSION OF REPORTS

Reports	Applicable forms	Due dates
Initial Report	Forms AP–1 and AP–2 and: —AP–3 or AP–4 for R&D activities; —AP–5 for civil nuclear-related manufacturing, assembly or construction; and —AP–6 for mining and ore beneficiation	January 31 of the year following any calendar year in which you commenced activities at a location for which you have not previously submitted an *Initial Report* to BIS. If you are required to submit an *Annual Update Report* because of on-going previously reported activities at the same location, during the same reporting period, you may include the new activities in your *Annual Update Report,* instead of submitting a separate *Initial Report.*
Annual Update Report	Forms AP–1 and AP–2 and: —AP–3 or AP–4 for R&D activities; —AP–5 for civil nuclear-related manufacturing, assembly or construction; and —AP–6 for mining and ore beneficiation	January 31 of the year following any calendar year in which changes to location activities or information took place if there were: —Changes to previously reported activities; —Changes or updates to information on Form AP–1 (other than updates or changes to the certifying official) or Form AP–2; *or* —New activities not previously reported (included, in lieu of submitting a separate *Initial Report,* when an *Annual Update Report* is otherwise required for the same location).
No Changes Report	Form AP–17	January 31 of the year following any calendar year in which there were no changes to previously reported activities or location information (other than updates or changes to the certifying official).
Import Confirmation Report.	Forms AP–1, AP–2, and AP–14	Within 30 calendar days of receiving notification from BIS.
Supplemental Information Report.	Forms AP–1, AP–2, and AP–15 Form AP–15	—Within 15 calendar days of receiving notification from BIS concerning an IAEA request for amplification or clarification. —Within 30 calendar days after: • You receive a post-complementary access letter from BIS. • You discover an error or omission in activity information contained in your most recent AP report; *or* • There is a change in company information or in ownership of a location.

PART 784—[AMENDED]

■ 10. The authority citation for 15 CFR part 784 is revised to read as follows:

Authority: 22 U.S.C. 8101–8181; Executive Order 13458 (February 4, 2008).

■ 11. Section 784.6 is revised to read as follows:

§ 784.6 Post complementary access activities.

Upon receiving the IAEA's final report on complementary access, BIS will forward a copy of the report to the location for its review, in accordance with § 784.3(k)(2) of the APR. Locations may submit comments concerning the IAEA's final report to BIS, and BIS will consider them, as appropriate, when preparing its comments to the IAEA on the final report. BIS also will send locations a post complementary access letter detailing the issues that require follow-up action (see § 783.2(d) of the APR).

PART 785—[AMENDED]

■ 12. The authority citation for 15 CFR part 785 is revised to read as follows:

Authority: 22 U.S.C. 8101–8181; Executive Order 13458 (February 4, 2008).

PART 786—[AMENDED]

■ 13. The authority citation for 15 CFR part 786 is revised to read as follows:

Authority: 22 U.S.C. 8101–8181; Executive Order 13458 (February 4, 2008).

Matthew S. Borman,

Deputy Assistant Secretary for Export Administration.

[FR Doc. 2021–27836 Filed 12–28–21; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 172

[Docket No. FDA–2021–F–1157]

Lallemand Inc.; Filing of Food Additive Petition

AGENCY: Food and Drug Administration, HHS.

ACTION: Notification of petition.

SUMMARY: The Food and Drug Administration (FDA or we) is announcing that we have filed a petition, submitted by Lallemand Inc., proposing that the food additive regulations be amended to provide for the safe use of vitamin D_2 heat-killed (''inactive'') baker's yeast as a source of vitamin D_2 in specific food categories.

DATES: The food additive petition was filed on September 28, 2021.

ADDRESSES: For access to the docket to read background documents or comments received, go to *https://www.regulations.gov* and insert the docket number found in brackets in the heading of this document into the ''Search'' box and follow the prompts, and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Katie Overbey, Center for Food Safety and Applied Nutrition, Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740, 240–402–7536.

SUPPLEMENTARY INFORMATION: Under section 409(b)(5) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 348(b)(5)), we are giving notice that we have filed a food additive petition (FAP 1A4829), submitted by Lallemand Inc., 1620 rue Prefontaine, Montreal, Quebec, H1W 2N8, Canada. The petition proposes to amend the food additive regulations in 21 CFR part 172, *Food additives permitted for direct addition to food for human consumption,* to allow for the safe use of vitamin D_2 heat-killed bakers yeast as a nutrient supplement in foods to which vitamin D_2 mushroom powder is currently allowed to be added under § 172.382 (21 CFR 172.382), at the maximum level of vitamin D_2 authorized under § 172.382.

The petitioner has claimed a categorical exclusion under 21 CFR 25.32(k) because the substance is intended to remain in food through ingestion by consumers and is not intended to replace macronutrients in food. In addition, the petitioner has stated that, to their knowledge, no extraordinary circumstances exist that would warrant at least an environmental assessment (see 21 CFR 25.21). If FDA determines a categorical exclusion applies, neither an environmental assessment nor an environmental impact statement is required. If FDA determines a categorical exclusion does not apply, we will request an environmental assessment and make it available for public inspection.

Dated: December 21, 2021.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2021–28162 Filed 12–28–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF STATE

22 CFR Part 22

[Public Notice: 11482]

RIN 1400–AF33

Schedule of Fees for Consular Services—Nonimmigrant and Special Visa Fees

AGENCY: Department of State.

ACTION: Proposed rule.

SUMMARY: The Department of State (Department) proposes adjustments to the Schedule of Fees for Consular Services (Schedule of Fees) of the Bureau of Consular Affairs (CA) for several nonimmigrant visa (NIV) application processing fees, the Border Crossing Card (BCC) for Mexican citizens age 15 and over, and the waiver of the two-year residency requirement (J-Waiver) fee. The proposed changes are based on the findings of the most recently approved update to the Cost of Service Model (CoSM). They ensure that the fees for providing these consular services better align with the costs of providing the services.

DATES: The Department of State will accept comments until February 28, 2022.

ADDRESSES: Interested parties may submit comments to the Department by any of the following methods:

- Visit the *Regulations.gov* website at: *http://www.regulations.gov* and search for the Regulatory Information Number (RIN) 1400–AF33 or docket number DOS–2021–0019.
- *Email: fees@state.gov.* You must include the RIN (1400–AF33) in the subject line of your message.
- All comments should include the commenter's name, the organization the commenter represents (if applicable), and the commenter's address. If the Department is unable to read your comment for any reason, and cannot contact you for clarification, the Department may not be able to consider your comment. After the conclusion of the comment period, the Department will publish a Final Rule that will address relevant comments as expeditiously as possible.

During the comment period, the public may request an appointment to review CoSM data on site if certain conditions are met.[1] To request an appointment, please call 202–485–8915

[1] Members of the public meeting the conditions would be permitted to see high-level information, including total cost, total volume, and unit costs.

and leave a message with your contact information.

FOR FURTHER INFORMATION CONTACT: Johanna Cruz, Management Analyst, Office of the Comptroller, Bureau of Consular Affairs, Department of State; phone: 202–485–8915, email: *fees@state.gov*.

SUPPLEMENTARY INFORMATION:

Background

The proposed rule makes changes to the Schedule of Fees in 22 CFR 22.1. The Department generally sets and collects fees for consular services based on the concept of full cost recovery to the U.S. government. The Department's CoSM uses an Activity-Based Costing (ABC) methodology to calculate annually the direct and indirect costs to the U.S. government associated with each consular good and service the Department provides. The fees are based on these cost estimates and the Department aims to update the Schedule of Fees biennially unless a significant change in costs warrants an immediate recommendation to amend the Schedule. The Department proposes these fee changes based on the results of the most recently approved update to the CoSM, which indicates that the increases are needed to fully recover the costs of providing these services. Specifically, the Department is incurring additional costs attributable to several NIV application processing fees, the adult BCC fee, and the J-Waiver fee that are not reflected in the current fees. To recover the costs of providing these specific consular services, the Department utilized a 10-year demand average to calculate the proposed fees. This was done to reduce the short-term volatility of demand because of the COVID–19 pandemic and stabilize price points for a longer duration of time.

What is the authority for this action?

The Department of State derives the general authority to set and collect fees for consular services it provides from the user charges statute, 31 U.S.C. 9701. *See, e.g.* , 31 U.S.C. 9701(b)(2)(A) (''The head of each agency . . . may prescribe regulations establishing the charge for a service or thing of value provided by the agency . . . based on . . . the costs to the government.''). As implemented through Executive Order 10718 of June 27, 1957, 22 U.S.C. 4219 further authorizes the Department to establish fees to be charged for official services provided by U.S. embassies and consulates.

Several statutes address specific fees relating to nonimmigrant visas. For instance, Sec. 140(a) of Public Law 103–236, 108 Stat. 382, as amended, reproduced at 8 U.S.C. 1351 (note), establishes a cost-based application processing fee for nonimmigrant machine-readable visas (MRV) and BCCs. *See also* 8 U.S.C. 1713(b). Additionally, Sec. 501 of Public Law 110–293, Title V, 122 Stat. 2968, reproduced at 8 U.S.C. 1351 (note), requires the Secretary of State to collect an additional $2 surcharge (the ''HIV/AIDS/TB/Malaria surcharge'') on all MRVs and BCCs as part of the application processing fee; this surcharge must be deposited into the Treasury and goes to support programs to combat HIV/AIDS, tuberculosis, and malaria. Furthermore, 8 U.S.C. 1351 establishes a reciprocal NIV issuance fee, requiring that the fee charged an applicant from a foreign country for issuance of an NIV be based, insofar as practicable, on the amount of visa or other similar fees charged to U.S. nationals by that foreign country.

Some people are exempted by law or regulation from paying specific fees. For example, certain individuals who engage in charitable activities or who qualify for diplomatic visas are exempt from the NIV application processing fee. *See* 8 U.S.C. 1351; 22 CFR 41.107(c). Exemptions are included in the Schedule of Fees.

Various statutes permit the Department to retain some of the fee revenue it collects, rather than depositing it into the general fund of the Treasury. As relevant, the Department retains the MRV and BCC processing fees, *see* Public Law 103–236, Title I, Sec. 140(a)(2), 112 Stat. 2681–50, *reproduced at* 8 U.S.C. 1351 (note) and 8 U.S.C. 1713(d), as well as the J-Waiver fee, *see* 22 U.S.C. 1475e.

The Department last adjusted certain NIV fees and the J-Waiver fee as part of an interim final rule dated August 28, 2014, and those changes to the Schedule of Fees went into effect September 6, 2014 (79 FR 51247). A final rule regarding those fees was published on August 25, 2015 (80 FR 51464). The fees for non-petition-based NIVs (except E category) and other petition-based NIVs (H, L, O, P, Q, and R category NIVs), have not been updated since April 13, 2012 (77 FR 18907). A final rule adjusting these fees was published on September 17, 2012 (FR 57012). Non-petition-based NIVs constitute a significant majority of the overall NIV applications.

Why is the Department adjusting fees at this time?

As a general policy, each recipient should pay a reasonable user charge for government services, resources, or goods from which he or she derives a special benefit, at an amount sufficient for the U.S. Government to recover the full costs of providing the service, resource, or good. *See* 31 U.S.C. 9701; OMB Circular No. A–25, sec. 6(a)(2)(a). In accordance with this policy, the Department typically sets consular fees at an amount calculated to achieve full recovery of the costs to the U.S. government of providing the service, unless an exception applies. *See, e.g.* , 8 U.S.C. 1351 (noting that NIV reciprocity fees should be set in amounts corresponding to the total charges levied against nationals of the United States by foreign countries). In the case of the MRV fee, the Department is statutorily required to set the fee at cost if the actual cost is higher than $65. *See* 8 U.S.C. 1713(b).

The Department reviews consular fees periodically, including through the annual update to its CoSM, to determine each fee's appropriateness in light of the OMB guidance. The results of the most recent update form the basis of the changes proposed in this rule. The proposed fees have been rounded up to the nearest $5 consistent with accepted government fee setting practices, to account for and mitigate against the risk of exchange rate fluctuations.

Activity-Based Costing

To set fees to ensure full cost recovery, the Department must determine the true cost to the U.S. government of providing each consular service. Following guidance provided in ''Managerial Cost Accounting Concepts and Standards for the Federal Government,'' OMB's Statement #4 of Federal Accounting Standards (SFFAS #4), available at *http://www.fasab.gov/pdffiles/sffas-4.pdf*, the Department chose to develop its CoSM using an ABC methodology to determine the true cost of each consular service.

The Government Accountability Office (GAO) defines ABC as a ''set of accounting methods used to identify and describe costs and required resources for activities within processes.'' Organizations can use the same staff and resources (computer equipment, production facilities, etc.) to produce multiple products or services; therefore, ABC models seek to identify and assign costs to processes and activities and then to individual products and services through the identification of key cost drivers referred to as ''resource drivers'' and ''activity drivers.'' The goal is to proportionally and accurately distribute costs. ABC models require financial and accounting analysis and modeling skills combined with a detailed understanding

of an organization's business processes. SFFAS #4 provides a detailed discussion of the use of cost accounting by the U.S. government.

The ABC approach focuses on the activities required to produce a particular service or product and uses resource drivers to assign costs through activities to services. Resource drivers assign the organization's costs (resources including materials, supplies and labor utilized in the production or delivery of services and products) to activities using business rules that reflect the operational reality of CA and the data available from consular systems, surveys, and internal records. Most resource drivers are based on time spent on each activity. For example, the Consular Overseas Data Collection (CODaC) survey captures how different categories of consular staff spend their time on consular work performed overseas. The information collected through the CODaC is used to populate the CODaC resource driver, which is a model input for time spent on specific activities for several different consular employee types and assigned to different categories of NIVs. Activity drivers differentiate levels of effort associated with activities (the work performed by the organization such as adjudication, printing of visa foils, and performing data intake, etc.) that are applied to each cost object and are often volume driven. For example, the cost of printing NIV visa foils is assigned to the different categories of NIVs based on the total number of NIVs issued for each NIV type.

Here is an example: Imagine a government agency that has a single facility it uses to prepare and issue a single product—a driver's license. In this simple scenario, every cost associated with that facility (the salaries of employees, the electricity to power the computer terminals, the cost of a blank driver's license, etc.) can be attributed directly to the cost of producing that single item. If that agency wants to ensure that it is charging a ''self-sustaining'' price for driver's licenses, it only has to divide its total costs for a given time period by an estimate of the number of driver's licenses to be produced during that same time period. However, if that agency issues multiple products (driver's licenses, non-driver ID cards, etc.), has employees that work on other activities besides licenses (for example, accepting payment for traffic tickets), and operates out of multiple facilities it shares with other agencies, it becomes much more complex for the agency to determine exactly how much it costs to produce any single product. In those instances, the agency would need to know what percent of time its employees spend on each service and how much of its overhead (rent, utilities, facilities maintenance, etc.) can be allocated to the delivery of each service to determine the cost of producing each of its various products—the driver's license, the non-driver ID card, etc. Using an ABC model allows the agency to develop those cost estimates.

The Cost of Service Model (CoSM)

The Department has been conducting periodic cost of service studies using an ABC methodology to determine the costs of its consular services since 2009. In 2010, the Department moved to adopt an annually updated CoSM that measures all of its consular operations and costs, including all of the activities needed to provide consular services. The CoSM provides a comprehensive and detailed look at all consular services as well as all services that the Department performs for other agencies in connection with its consular operations. The CoSM now includes approximately 112 distinct activities and enables the Department to model its consular-related costs with a higher degree of precision.

The Department continues to refine and improve the CoSM annually in order to achieve full cost recovery for the U.S. government. Because the CoSM is a complex series of iterative computer processes incorporating more than a million calculations, it is not reducible to a tangible form such as a document. Inputs are formatted in spreadsheets for entry into the ABC software package, which is an industry standard commercial off-the-shelf product licensed through SAP Business Objects. The software's output includes spreadsheets with raw unit costs, validation reports, and management reports.

The Department uses three methods outlined in SFFAS Statement #4 (paragraph 149(2)) to assign resource costs to activities in the model: (a) Direct tracing; (b) assigning costs through estimation based on surveys, interviews, or statistical sampling; and (c) allocations. The Department uses direct tracing to assign the cost of, for example, a physical passport book or the visa foil placed in a visa applicant's passport, to the passport or visa service respectively. Assigning costs to activities such as adjudicating a visa application requires estimation based on surveys, interviews, or statistical sampling to determine who performs an activity and how long it takes (see below for additional details regarding assigning labor costs).

Indirect costs (overhead) are allocated according to the level of effort needed for a particular activity. Level of effort captures the time spent on an activity in minutes, hours, or number of full-time equivalent (FTE) employees, as measured in the CODaC and domestic task reports. Where possible, the model uses overhead cost pools to assign indirect costs only to related activities. For instance, the cost of rent for domestic visa offices is assigned only to visas, not to passports or other services the Department provides overseas. The Department allocates indirect support costs to each consular activity by the level of effort needed by that consular activity. For example, the model allocates a portion of the cost of the Department's Bureau of Global Talent Management (formerly known as the Bureau of Human Resources) to consular activities as this Bureau supports CA by providing onboarding and administrative support for domestic and overseas consular employees, including support for permanent change of station (PCS) requirements for all consular personnel that ensures timely deployment of personnel, families, and personal effects.

To assign labor costs, the Department relies on a variety of industry-standard estimation methodologies. To document how consular staff divide their time overseas, the Department conducts CODaC surveys at a representative sample of consular sections overseas each year. In response to the survey, consular officers indicate how much time is spent on particular consular activities overseas, such as data intake and review, interview and adjudication, and passback activities. The Department uses survey data from over 200 consular sections in consulates and embassies worldwide in conjunction with volume data from various consular workload systems to develop resource drivers to assign labor costs to activities. For consular activities that take place in the United States, the Department collects volume data from periodic workload reports provided by the directorates managing these consular services. Financial information is gathered from reports in the Department's Global Financial Management System (GFMS) managed by the Bureau of the Comptroller and Global Financial Services (CGFS). The Department converts the cost and workload data into resource drivers and activity drivers for each resource and activity.

The CoSM uses historical workloads (*i.e.* , demand for the service) as well as projected workloads, which are based

on demand projections produced by CA, to estimate the costs of providing consular services. The current model update relied on FY 2019 actual costs and level of effort (*i.e.* , time spent on a specific activity) data, and applied a 10-year average for workload volumes, using historic workload actuals from FYs 2015–2019 and projected workload volumes for FYs 2020–2024. Unit costs for each NIV service are calculated by taking the total calculated costs for the particular service and dividing that cost by the total 10-year average volumes for each particular service. Using a 10-year average of volumes for NIV services reduces the impact of volatility in demand resulting from COVID–19 on the model results, given that the significant reduction in NIV demand resulting from the COVID–19 pandemic is expected to continue for the next few years. Over time, use of a 10-year average is expected to result in full cost recovery once the fee is updated, provided the demand projections used to calculate this average are mostly in line with actual demand during this period and costs remain relatively stable.

Proposed Visa Fee Changes: Nonimmigrant Visa Services

Nonimmigrant Visa Application and Border Crossing Card Processing Fees

The Department proposes to increase the non-petition based NIV fee from $160 to $245 per application. Non-petition-based NIVs include a variety of nonimmigrant visas, such as those for business and tourist travel (B1/B2); students and exchange visitors (F, M, and J); crew and transit visas (C and D); representatives of foreign media (I), and other country-specific visa classes, as well as BCCs for applicants age 15 or older who are citizens of and resident in Mexico. ''Non-petition'' means that these visas do not require separate requests known as ''petitions'' to be adjudicated prior to the visa application to establish that the individual meets certain qualifying criteria for the relevant status (*e.g.* , that the beneficiary of the petition has the relevant familial relationship to the petitioner). Non-petition based NIVs make up nearly 90 percent of all NIV workload.

The Department also proposes to increase fees for all petition based NIVs related to employment in the United States from $190 to $310. Petition-based NIVs include categories for temporary workers and trainees (H); intracompany transferees (L); aliens of extraordinary ability (O); athletes, artists, and entertainers (P); international cultural exchange participants (Q); and religious workers (R). These NIVs require an approved petition from U.S. Citizenship and Immigration Services (USCIS) prior to applying for a visa and demand significantly more work by the consular officer than non-petition based NIVs.

The Department last updated the non-petition-based and the petition-based NIV fees noted above through rulemaking in 2012, based on the results of the 2011 CoSM. Costs have increased modestly for non-petition based NIVs each year since 2012, an increase of 1.9 percent per year since the fee was last adjusted. Compensation costs for these services have decreased and non-compensation costs have increased. Compensation costs include the salary, benefits, and costs associated with direct-hire full-time domestic and overseas employees including Foreign Service Officers (FSOs), Locally Employed (LE) staff, Eligible Family Members (EFMs), Consular Agents, and Civil Service employees. Non-compensation costs include operating costs like rent, technology costs, contract costs (including contract staff costs, and large support contracts like the Global Support Strategy (GSS) contract), materials (*e.g.,* visa foils) and International Cooperative Administrative Support Services (ICASS) costs. The changes to these categories of costs are largely due to a shift from FSO and LE staff overseas to GSS contract staff spending time on activities associated with this service. GSS provides support services for nonimmigrant and immigrant visa operations at United States consulates and embassies abroad, including but not limited to public inquiry services, appointment services, fee collection services, biometric enrollment services, document delivery services, and data collection services.

Costs have increased slightly for petition-based categories since the last fee updates, from $149 million to $175 million, a 1.6 percent increase per year since the fee was last adjusted. As with non-petition based NIVs, compensation costs for these services have decreased and non-compensation costs have increased, largely the result of the shift of certain support activities to the GSS contract as noted above. The expansion of the GSS contract helped reduce time spent by consular officers on non-adjudication tasks, which in turn reduced overall compensation costs while raising the non-compensation costs with increased time spent by contract staff on these tasks.

While costs for the non-petition-based NIV service and the petition-based NIVs noted above have increased steadily and modestly since the last adjustment to these fees, actual demand has fluctuated more dramatically from year to year and has a greater impact on unit costs.

Fiscal year	Demand
FY2000	9,555,828
FY2001	10,373,274
FY2002	7,965,703
FY2003	6,557,265
FY2004	6,643,800
FY2005	6,941,519
FY2006	7,331,518
FY2007	8,091,366
FY2008	8,169,792
FY2009	7,130,164
FY2010	7,670,062
FY2011	8,832,102
FY2012	10,343,241
FY2013	10,722,905
FY2014	11,734,749
FY2015	13,307,973
FY2016	13,343,570
FY2017	12,339,180
FY2018	11,965,382
FY2019	11,657,163
FY2020 *	5,783,251
FY2021 *	2,200,000
FY2022 *	3,080,000
FY2023 *	4,774,000
FY2024 *	5,967,500

* Projected Demand, in accordance with model, which included predicted volumes for FY 2020–2024.

It is important to capture and analyze these fluctuations in demand to reflect visa demand trends while also approaching fee setting in a moderate and sustainable way. Therefore, as noted above, the proposed NIV fee recommendations use a 10-year average for demand to reduce volatility in unit costs and to prevent the extreme spikes in unit costs that would result if the Department used only demand figures from the lowest levels during the pandemic to set the fee. Because of the dramatic drop in visa demand experienced in FY 2020 due to the pandemic and projected to continue in the coming years, the 10-year average volume used in this calculation is still much lower than demand figures used to calculate this fee in prior models. As a result, the calculated unit cost for these services, which is the total service cost divided by the total service volume, has increased, and has led to the proposed visa application processing fee increases.

The Department also proposes to increase the E category NIV fee from $205 to $485. This fee was last adjusted through an interim final rule in 2014 based on the results of the 2012 CoSM. The E category NIV is for traders, investors, and their employees who are in executive and supervisory positions, as well as those who possess skills essential to the firm's operations from countries that have a qualifying treaty of

commerce and navigation with the United States. These NIV applications have complex requirements that demand extensive review by adjudicators overseas. E visas are used to engage in trade primarily between the United States and the home country and represent less than one percent of all NIVs. The costs for this service have increased significantly while demand has only slightly increased since this fee was last adjusted.

The significant increase in the cost of E Visas is attributable to increased level of effort on the part of the adjudicator as well as refined data collection techniques, which established that consular staff spend significantly more time (level of effort) to provide this service than previously captured. Following updates to the Foreign Affairs Manual, E visa adjudication guidelines now require more extensive officer scrutiny of applicant case files, which increases case-processing times. Applicant interviews are also much longer than the standard interview for non-petition based NIVs.

In addition, the CODaC was moved from a paper-based survey to an online platform in 2017, to remedy errors and difficulties in the user experience. The online platform collects more accurate data because the responses go directly to the online database rather than being manually entered by a person. This, in turn, yields a more precise cost estimate, which better reflects the increased staff resources needed to process and adjudicate E visas. Because the associated costs of providing this service have increased significantly and demand for this service has remained relatively stable, the calculated unit cost increased significantly. As a result, the Department proposes to increase this fee to recover the cost of providing this service. *See* 8 U.S.C. 1713(b) requiring the fee for MRVs, which include E visas, to be set at the higher of $65 or the actual cost of providing the service).

Proposed Visa Fee Changes: Special Visa Services

Waiver of Two-Year Residency Requirement

The Department proposes to increase the J-Waiver fee from $120 to $510. This fee was last adjusted through rulemaking in 2014 based on the results of the 2012 CoSM. Certain categories of exchange visitors (J–1) are subject to a two-year home-country physical presence requirement. Exchange visitor program participants who are subject to the two-year home-country physical requirement must apply for a waiver either to stay in the United States beyond the end date of their program or if they want to submit an application to USCIS for a change in visa status. Otherwise, the exchange visitor is required to return to their home country for an aggregate of at least two years before applying for another visa to the United States. This two-year residency requirement upon request and approval may be waived in certain circumstances and the Department proposes increasing the associated fee for processing these waiver requests.

The costs for this service have increased while demand has decreased since the last fee adjustment. Since this fee was last updated, CA discovered that not all costs for J-Waivers were being recorded correctly in the Department's GFMS. As a result, the Visa Office worked with CA's Comptroller offices to identify and assign costs correctly. Prior to this update, no operating costs, particularly those for contractors spending time on this service, were recorded and assigned to the Visa Office's Waiver Review division, the division responsible for adjudicating these waivers.

After identifying and properly assigning these costs, all operating costs for J-Waivers have now been properly recorded, including contract costs related to this service. This update has resulted in more accurate cost assignment to this service and has led to an increase of related compensation and non-compensation costs. These cost increases are primarily attributed to the increases in level of effort that have recently been identified and properly assigned to this service. That combined with a significant decrease in demand led to an increase in the calculated unit cost. The unit cost increase is significant because of the increased costs and the relatively low volume for this service during the 10-year demand timeframe used to calculate this fee.

Regulatory Findings

Administrative Procedure Act

The Department is publishing this rule as a proposed rule, with a 60-day provision for public comments.

Regulatory Flexibility Act

The Department has reviewed this rule and, by approving it, certifies that it will not have a significant economic impact on a substantial number of small entities as defined in 5 U.S.C. 601(6).

Unfunded Mandates Act of 1995

This rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501–1504.

Executive Order 12866

Under Executive Order (E.O.) 12866, the 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 economically significant under E.O. 12866.

The Department has reviewed this rule to ensure its consistency with the regulatory philosophy and principles set forth in E.O. 12866. This proposed rule is necessary in light of the CoSM's result that the cost of providing consular services has changed significantly since the last adjustment to these fees and justifies the implementation of new fees through the rulemaking process. The Department is setting the fees in accordance with 31 U.S.C. 9701 and other applicable authorities, as described in more detail above. *See, e.g.,* 31 U.S.C. 9701(b)(2)(A) (''The head of each agency . . . may prescribe regulations establishing the charge for a service or thing of value provided by the agency . . . based on . . . the costs to the Government.'').

The Department has reviewed the potential impact that these NIV application processing fee increases will have on demand and has determined that the impact on those who seek NIVs will be *de minimis* over the lifetime of the approved visa. The Department does not believe that the increased NIV application processing costs will deter

non-U.S. citizens from applying for tourist, work, and business visas.

The following table summarizes the impact of this proposed rule:

TABLE 1—IMPACT OF PROPOSED FEE CHANGES

Item No.	Proposed fee	Current fee	Change in fee	Percentage increase	Projected annual number of applications [1]	Estimated change in annual fees collected [2]	Change in state retained fees	Change in remittance to treasury
Schedule of Fees for Consular Services								
*	*	*	*	*	*	*		
Nonimmigrant Visa Services								
*	*	*	*	*	*	*		
21. Nonimmigrant Visa Application and Border Crossing Card Processing Fees (per person)								
(a) Non-petition-based nonimmigrant visa (except E category)	$245	$160	$85	53	2,377,236	$202,065,060	$202,065,060	$0
(b) H, L, O, P, Q, and R category nonimmigrant visa	310	190	120	63	239,529	28,743,480	28,743,480	0
(c) E category nonimmigrant visa	485	205	280	137	17,902	5,012,560	5,012,560	0
(e) Border Crossing Card—age 15 and over (10 year validity)	$245	160	85	53	388,320	33,007,200	33,007,200	0
Immigrant and Special Visa Services								
*	*	*	*	*	*	*		
35. Special Visa Services								
(b) Waiver of two year residency requirement	510	120	390	325	6,291	2,453,490	2,453,490	0
Total						271,281,790	271,281,790	0

[1] Application volume based on FY 2022 projected workload. FY 2022 is the likely year of implementation.
[2] Change in fee collection is based on FY 2022 projected workload x change to fee.

Economic Impact

In anticipation of questions from the public and various other stakeholders, the Department commissioned a price elasticity of demand study on the proposal for these fee increases. From the perspective of a tourist coming to the United States, the study found that the average cost to travel to the country is $4,834 by air. This information came from correspondence with the National Travel & Tourism Office at the Department of Commerce. Assuming that figure does not include the cost of a visa, the proposed fee increase for non-petition based NIVs would raise the total cost of a trip from $4,994 ($4,834 + $160) to $5,079 ($4,834 + $245). This reflects a minimal increase of less than two percent of the cost of the trip, assuming only one trip is taken during the visa's validity. If two trips are taken, the total cost increase is less than one percent; if more than two trips are taken, the increase is even less. Therefore, we expect this fee increase to have a *de minimis* effect on the demand for travel (see Table 2 below).

TABLE 2—ECONOMIC IMPACT OF NON-PETITION-BASED NIV FEE INCREASE

Number of trips	1	2	5	7	10
Cost Per Trip	$4,834.21	$4,834.21	$4,834.21	$4,834.21	$4,834.21
Current Consular Fee	$160.00	$80.00	$32.00	$22.86	$16.00
Total Cost of Trip	$4,994.21	$4,914.21	$4,866.21	$4,857.07	$4,850.21
Cost per Trip	$4,834.21	$4,834.21	$4,834.21	$4,834.21	$4,834.21
Proposed Consular Fee	$245.00	$122.50	$49.00	$35.00	$24.50
Total Cost of Trip	$5,079.21	$4,956.71	$4,883.21	$4,869.21	$4,858.71
$ Increase	$85.00	$42.50	$17.00	$12.14	$8.50
% Increase	1.70%	0.86%	0.35%	0.25%	0.18%

In a similar manner, the Department assessed the impact on demand that the fee increase might have on individuals coming over on a particular type of petition-based NIV, the H–2A Visa (Temporary Worker Performing Agricultural Services Unavailable in the United States). The total cost to bring over an agricultural worker is estimated to be $10,177, or $10,367 with the current visa fee of $190. This information came from the U.S. Department of Agriculture. The proposed new fee raises the total cost from $10,367 ($10,177 + $190) to $10,487 ($10,177 + $310). This increases the total cost of bringing a worker over by just over one percent.

While the study did not cover the increases for other petition-based NIVs, E visas, or J-Waiver requests, similar

logic can be followed. Individuals use a J-Waiver, for example, to transfer to a work visa or a fiancé visa without having to go back to their home countries for two years. Given that the waiver confers a significant economic benefit and that the average cost of international travel to the United States is more than $510, we expect this fee increase to also have a *de minimis* effect on demand.

Executive Orders 12372 and 13132

This regulation 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. Therefore, in accordance with section 6 of E.O. 13132, it is determined that this rule does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement. The regulations implementing E.O. 12372 regarding intergovernmental consultation on federal programs and activities do not apply to this regulation.

Executive Order 13175

The Department has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not preempt tribal law. Accordingly, the requirements of E.O. 13175 do not apply to this rulemaking.

Paperwork Reduction Act

This rule does not impose any new reporting or record-keeping requirements subject to the Paperwork Reduction Act.

List of Subjects in 22 CFR Part 22

Consular services, Fees.

Accordingly, for the reasons stated in the preamble, 22 CFR part 22 is proposed to be amended as follows:

PART 22—SCHEDULE OF FEES FOR CONSULAR SERVICES—DEPARTMENT OF STATE AND FOREIGN SERVICE

■ 1. The authority citation for part 22 continues to read as follows:

Authority: 8 U.S.C. 1101 note, 1153 note, 1157 note, 1183a note, 1184(c)(12), 1201(c), 1351, 1351 note, 1713, 1714, 1714 note; 10 U.S.C. 2602(c); 22 U.S.C. 214, 214 note, 1475e, 2504(h), 2651a, 4206, 4215, 4219, 6551; 31 U.S.C. 9701; E.O. 10718, 22 FR 4632 (1957); Exec. Order 11295, 31 FR 10603, 3 CFR 1966–1970 Comp. p. 570.

■ 2. Amend the table in 22.1 by revising entries 21 and 35 to read as follows:

§ 22.1 Schedule of Fees.

The following table sets forth the proposed change to the following category listed on the U.S. Department of State's Schedule of Fees for Consular Services:

TABLE 1 TO § 22.1—SCHEDULE OF FEES FOR CONSULAR SERVICES

Schedule of Fees for Consular Services	
Item No.	Fee
Nonimmigrant Visa Services	
* * * * * * *	
21. Nonimmigrant Visa Application and Border Crossing Card Processing Fees (per person)	
(a) Non-petition-based nonimmigrant visa (except E category)	$245
(b) H, L, O, P, Q and R category nonimmigrant visa	310
(c) E category nonimmigrant visa	485
(e) Border crossing card—age 15 and over (10 year validity)	245
* * * * * * *	
Immigrant and Special Visa Services	
* * * * * * *	
35. Special visa services:	
(b) Waiver of two-year residency requirement	510
* * * * * * *	

Kevin E. Bryant,

Deputy Director, Office of Directives Management, U.S. Department of State.

[FR Doc. 2021–28010 Filed 12–28–21; 8:45 am]

BILLING CODE 4710–06–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[WT Docket No. 19–38; FCC 21–120; FR ID 62114]

Partitioning, Disaggregation, and Leasing of Spectrum

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Federal Communications Commission (Commission or FCC) proposed an Enhanced Competition Incentive Program to encourage licensees to offer opportunities for small carriers, Tribal Nations, and entities committing to serve rural areas to obtain spectrum via lease, partition, or disaggregation. The *Further Notice of Proposed Rulemaking* seeks comment on the proposed Enhanced Competition Incentive Program, its incentives, and waste, fraud, and abuse protections, as well as additional proposals including alternative construction benchmarks for all wireless radio service licensees and flexibility to reaggregate licenses.

DATES: Interested parties may file comments on or before February 28, 2022, and reply comments on or before March 29, 2022.

ADDRESSES: You may submit comments, identified by WT Docket No. 19–38, by any of the following methods:

- *Electronic Filers:* Comments may be filed electronically using the internet by accessing the ECFS: *http://apps.fcc.gov/ecfs/*.
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

• Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

• Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.

• U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street NE, Washington DC 20554.

• Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID–19. See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy, Public Notice, DA 20–304 (March 19, 2020). *https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy*.

People with Disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

FOR FURTHER INFORMATION CONTACT: Katherine Nevitt of the Wireless Telecommunications Bureau, Mobility Division, at (202) 418–0638 or *Katherine.Nevitt@fcc.gov*. For information regarding the Paperwork Reduction Act of 1995 (PRA) information collection requirements contained in this document, contact Cathy Williams, Office of Managing Director, at (202) 418–2918 or *Cathy.Williams@fcc.gov*.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Further Notice of Proposed Rulemaking* in WT Docket No. 19–38, FCC 21–120 adopted November 18, 2021 and released November 19, 2021. The full text of this document, including all Appendices, is available for inspection and copying during normal business hours in the FCC Reference Center, 45 L Street NE, Washington, DC 20554, or available for viewing via the Commission's ECFS website by entering the docket number, WT Docket No. 19–38. Alternative formats are available for people with disabilities (Braille, large print, electronic files, audio format), by sending an email to *FCC504@fcc.gov* or calling the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Ex Parte Rules

This proceeding shall continue to be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules (47 CFR 1.1200 *et seq.*). Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

Synopsis

I. Introduction

1. With this *Further Notice of Proposed Rulemaking,* we take key steps towards closing the digital divide and we make further progress on the goals set forth by Congress in the Making Opportunities for Broadband Investment and Limiting Excessive and Needless Obstacles to Wireless Act (MOBILE NOW Act) regarding the diversity of spectrum access and the provision of service to rural areas. In particular, we propose an Enhanced Competition Incentive Program focused on increasing spectrum access for small carriers and Tribal Nations and on increasing the availability of advanced telecommunications services in rural areas with the goals of promoting greater competition in and expanded access to such services. To achieve these vital Commission goals, we propose to modify our existing partitioning, disaggregation, and leasing rules by providing specific incentives for stakeholders to participate in the program by engaging in qualifying transactions that make spectrum available to these entities and in these areas. Separate from the incentive program, we seek comment on potential alternatives to population-based performance requirements for a variety of stakeholders. Further, we propose to provide for reaggregation of partitioned and disaggregated licenses up to the original license size.

II. Background

2. *Partitioning and Disaggregation.* The Commission first adopted rules permitting geographic partitioning, which is the assignment of a geographic portion of a geographic area licensee's license area, and spectrum disaggregation, which is the assignment of portions of blocks of a geographic area licensee's spectrum, for Broadband PCS licenses in 1996. The Commission has since adopted partitioning and disaggregation rules on a service-by-service basis to provide licensees the ''flexibility to determine the amount of spectrum they will occupy and the geographic area they will serve.''

3. The Commission's partitioning and disaggregation rules apply to all ''Covered Geographic Licenses,'' which consist of specified ''Wireless Radio Services'' (WRS) for which the Commission has auctioned exclusive spectrum rights in defined geographic areas. The license term for a partitioned license area or disaggregated spectrum license is the remainder of the original licensee's license term. Parties to a geographic partitioning, a spectrum disaggregation, or a combination of both have two options to satisfy service-specific performance requirements (*i.e.,* construction and operation requirements). First, each party may certify that it will individually satisfy any service-specific performance requirements and, upon failure to do so, must individually face any service-specific performance penalties. Alternatively, both parties may agree to

share responsibility for compliance with performance requirements, and both parties are subject to any service-specific penalties.

4. *Spectrum Leasing.* In 2003, the Commission adopted the first comprehensive set of rules to allow licensees in the WRS to enter into a variety of spectrum leasing arrangements. In so doing, the Commission recognized the public interest benefits of permitting ''additional spectrum users to gain ready access to spectrum,'' thus enabling the ''provision of new and diverse services and applications to help meet the ever-changing needs of the public.'' The Commission's spectrum leasing rules apply to all ''included services,'' as set forth in section 1.9005 of the Commission's rules and which include WRS where commercial or private licensees hold exclusive use rights. A ''spectrum leasing arrangement'' is an arrangement between a licensed entity and a third-party entity in which the licensee (spectrum lessor) leases certain of its spectrum usage rights in the licensed spectrum to the third-party entity, the spectrum lessee. Commission rules provide for two different types of spectrum leasing arrangements: (1) Spectrum manager leasing arrangements, in which the licensee/lessor retains *de facto* control of the licensed spectrum leased to the spectrum lessee; and (2) *de facto* transfer leasing arrangements, in which the lessee is primarily responsible for ensuring that its operations comply with the Communications Act and Commission policies and rules.

5. While the licensee/lessor remains responsible for compliance with any construction and performance requirements applicable to the leased spectrum, the licensee/lessor may attribute to itself the build-out or performance activities of its spectrum lessee(s) for purposes of compliance with any such requirements.

6. *De facto* transfer spectrum leasing arrangements can be either long-term (more than one year) or short-term (one year or less). In general, *de facto* transfer spectrum leasing arrangements are subject to the Commission's general approval procedures, under which the Commission must grant the application prior to the parties putting the proposed spectrum leasing arrangement into effect.

7. *Statutory Requirement.* Section 616 of the MOBILE NOW Act required that, within a year of its enactment, the Commission initiate a rulemaking proceeding to assess whether to establish a program, or modify an existing program, under which a licensee that receives a license for exclusive use of spectrum in a specific geographic area under section 301 of the Communications Act of 1934 may partition or disaggregate the license by sale or long-term lease in order to, *inter alia,* make unused spectrum available to an unaffiliated covered small carrier or an unaffiliated carrier to serve a rural area. Congress also provided the Commission the flexibility to proceed if it found that such a program would promote the availability of advanced telecommunications services in rural areas or spectrum availability for covered small carriers.

8. Section 616 required the Commission to consider four questions in conducting an assessment of whether to establish a new program or modify an existing program to achieve the stated goals. First, would ''reduced performance requirements with respect to the spectrum obtained through the program . . . facilitate deployment of advanced telecommunications services in areas covered by the program''? Second, ''what conditions may be needed on transfers of spectrum under the program to allow covered small carriers that obtain spectrum under the program to build out the spectrum obtained under the program in a reasonable period of time''? Third, ''what incentives may be appropriate to encourage licensees to lease or sell spectrum, including (i) extending the term of a license . . . or (ii) modifying performance requirements of the license relating to the leased or sold spectrum''? And fourth, what is ''the administrative feasibility'' of those incentives and of ''other incentives considered by the Commission that further the goals of [section 616]''? Section 616 provided, however, that the Commission ''may offer a licensee incentives or reduced performance requirements under this section only if the Commission finds that doing so would likely result in increased availability of advanced telecommunications services in a rural area.'' Additionally, section 616 directs that, ''[i]f a party fails to meet any build out requirements set by the Commission for any spectrum sold or leased under this section, the right to the spectrum shall be forfeited to the Commission unless the Commission finds that there is good cause for the failure of the party.''

A. Notice of Proposed Rulemaking

9. On March 15, 2019, the Commission released the *Notice* pursuant to the MOBILE NOW Act, which initiated this proceeding to assess whether potential changes to the Commission's partitioning, disaggregation, and leasing rules might provide spectrum access to covered small carriers or promote the availability of advanced telecommunications services in rural areas. The *Notice* sought comment on the specific questions and considerations posed in the MOBILE NOW Act, but also sought comment on whether the Commission should consider applying any rule revisions to an expanded class of licensees beyond those Congress required it to consider.

10. The Commission received 15 comments and 10 reply comments in response to the *Notice*. Commenters generally supported rule revisions that would increase spectrum access for a variety of entities and increase the availability of advanced telecommunications in rural areas. As discussed below, many commenters also suggested that the Commission go beyond the MOBILE NOW Act statutory framework if necessary to serve the public interest and to achieve the stated goals.

III. Discussion

11. This *Further Notice* builds upon the efforts initiated in the *Notice* by proposing incentives that are guided by the MOBILE NOW Act framework but expand upon this approach to advance important Commission goals. As discussed in more detail below, we propose an Enhanced Competition Incentive Program (ECIP) focused on increasing spectrum access for small carriers and Tribal Nations and promoting the availability of advanced telecommunications services in rural areas by creating incentives for competition-enhancing transactions. We propose a range of incentives to promote partitioning, disaggregation, and leasing, including extending license terms by five years, extending construction periods by one year, and creating alternate rural-focused construction requirements. Under this two-pronged proposal, parties to qualifying transactions would establish program eligibility by: (1) Providing spectrum to small carriers or Tribal Nations; or (2) committing to serve a certain minimum amount of rural area. We also propose measures necessary to ensure program goals are met and that the program is not abused.

12. The ECIP that we propose here would establish specific incentives based on the record in the *Notice,* and would build upon Congress' goals in the MOBILE NOW Act. The ECIP also would further certain long-standing Commission goals by facilitating transactions that promote increased

spectrum access for stakeholders that will use this valuable resource efficiently and create meaningful service to rural communities. To develop a more workable solution for a variety of stakeholders, we seek comment on additional proposals on related issues that are consistent with the MOBILE NOW Act, but are based on our pre-existing authority under Title III of the Communications Act of 1934, as amended, pursuant to which the Commission adopted the original partitioning and disaggregation rules. After review of the record on the *Notice* and as discussed below, we find it in the public interest to explore benefits for Tribal Nations choosing to participate in the ECIP; benefits for an expanded group of stakeholders participating in ECIP through rural-focused transactions; alternative performance requirements for all WRS licenses independent of the specific ECIP benefits; and a spectrum license reaggregation process. The proposals discussed below are intended to facilitate increased spectrum access, rural service, and innovative and next-generation wireless use cases, bringing increased competition to underserved areas, while also easing the administrative burden placed on both licensees and Commission staff.

a. Enhanced Competition Incentive Program

13. To be eligible for ECIP benefits through a qualifying transaction, we propose that any covered geographic licensee may offer spectrum to an unaffiliated eligible entity through a partition and/or disaggregation, and any WRS licensee eligible to lease in an included service may offer spectrum to an unaffiliated eligible entity through a long-term leasing arrangement. As detailed below, we propose two types of ECIP qualifying transactions: Those that focus on small carriers and Tribal Nations gaining spectrum access, and those that involve any interested party that commits to operating in, or providing service to, rural areas. We recognize that stakeholders may be eligible for one or both paths. However, to achieve the goals of the program, maintain administrative feasibility as set forth in the MOBILE NOW Act, and reduce the potential for program abuse, we propose that each transaction be filed under either, but not both, prongs. This approach would result in consistent application of program benefits and safeguards to ensure program integrity.

i. Small Carrier or Tribal Nation Transactions

14. One of the goals of the MOBILE NOW Act was to encourage Commission examination of a program(s) that would promote spectrum availability for small carriers. Through qualifying transactions under this ECIP prong, we would promote small carriers' access to unused spectrum in any market licensed to a covered geographic licensee. We also find it appropriate to propose a narrow expansion beyond the MOBILE NOW Act statutory framework to increase spectrum access for Tribal Nations.

15. *Eligible Entities.* As indicated in the *Notice,* section 616 of the MOBILE NOW Act defined ''Covered small carrier'' as a carrier that ''(A) has not more than 1,500 employees (as determined under section 121.106 of title 13, Code of Federal Regulations, or any successor thereto); and (B) offers services using the facilities of the carrier.'' Further, section 616 applies the definition of ''carrier'' as set forth in section 3 of the Communications Act of 1934, meaning ''any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy.'' Consistent with Congressional intent, we propose to adopt these statutory definitions for use in the ECIP and to designate covered small carriers as an eligible beneficiary under this prong. We seek comment on whether these are the appropriate definitions for use in the program. In addition, section 616 restricts the partitioning or disaggregation to ''unaffiliated'' small carriers. Other than looking to the Commission's designated entity rules, we seek comment on how to determine whether a small carrier is affiliated.

16. We note that most commenters supported an expansion of the covered small carrier definition in the *Notice,* and we seek comment on alternative definitions. While we propose below to adopt more expansive eligibility requirements for rural-focused ECIP transactions, for transactions specifically focused on spectrum access not limited to rural areas, we propose a limited expansion of the group of eligible beneficiaries beyond covered small carriers to include Tribal Nations. This would further facilitate Tribal spectrum access in both rural and non-rural areas as needed. We propose, in the public interest, to include these Tribal Nations and seek comment on this approach. We propose that Tribal Nations eligible under this prong would include any federally-recognized American Indian Tribes and Alaska Native Villages, as well as consortia of federally recognized Tribes and/or Native Villages, or other entities controlled and majority-owned by such Tribes or consortia. We seek comment on whether this is the appropriate definition of Tribal Nations. As of January 2021, there are 574 federally-recognized Indian Tribes, but we note that there are no federally recognized Tribal Nations in Hawaii. We therefore seek comment on how we should facilitate transactions involving entities seeking to serve native Hawaiian Homelands.

17. *Minimum Spectrum and Geography.* We propose that a qualifying transaction under this prong must include a minimum of 50% of the licensed spectrum for each license(s) that is part of the transaction in a geographic area. This approach is intended to provide stakeholders flexibility in structuring transactions, while: (1) Ensuring sufficient spectrum is available for the provision of advanced telecommunications services; and (2) preventing transactions involving *de minimis* spectrum amounts that are entered into solely to obtain ECIP benefits. We seek comment on whether the proposed 50% spectrum threshold makes enough spectrum available to small carriers or Tribal Nations. Should we consider a lower or higher threshold percentage? For licenses that authorize paired frequency bands, should an equal or minimum percentage of the spectrum be from each band? Are there any alternative approaches for ensuring sufficient spectrum is made available to small carriers or Tribal Nations, while requiring a sufficient percentage to preclude abuse of the program?

18. We also propose that a qualifying transaction must include a minimum of 25% of the licensed market area for each license(s) that is part of the transaction, regardless of market size or market type. We seek comment on whether the 25% geographic threshold is the appropriate amount to balance incentives for program participation against concerns of sufficient land area for small carriers or Tribal Nations, and concerns related to preventing program gaming. Are there considerations that would warrant an increase or decrease in the minimum geography required for a qualifying transaction under this prong? For example, should the geographic thresholds be different based upon the varying size of the overall licensed market area (*e.g.,* counties, CMAs, PEAs, BEAs, MTAs, REAGs)? Should parties be able to count multiple transactions involving partitions of the same license

in aggregate to meet the minimum geographic threshold? We seek comment on the costs and benefits of our proposed approach and any suggested alternatives. We also recognize there may be situations where licenses have been previously disaggregated and/or partitioned and a resulting license(s) consists of a small amount of spectrum or small geographic area. Although we propose in this *Further Notice* to prevent licenses that have previously benefited from ECIP from receiving benefits again for the same license(s), we seek comment on whether, from the outset, we should restrict the ECIP to only licenses of a certain minimum spectrum size and geography area. We seek to avoid inclusion in the ECIP of transactions that might potentially evade the purpose of the respective 50% and 25% thresholds.

19. We note that the MOBILE NOW Act directed the Commission to examine potential changes to our partitioning, disaggregation, and leasing framework to offer incentives to meet specific goals. Such a focus would appear to exclude full license assignments, even those to small carriers and/or to rural licensees. We recognize that implementing the ECIP solely for transactions involving partition, disaggregation, or leasing, as Congress directed us to consider, may create a disincentive for stakeholders to engage in otherwise mutually beneficial transactions for full license assignments. Rather, these parties may instead negotiate transactions for smaller areas and/or less spectrum, solely to acquire ECIP benefits even where a full license assignment might be more appropriate given stakeholder needs. We therefore seek comment on whether we should permit full license assignments within the ECIP and, if so, how we should implement these types of transactions. We note that many of the ECIP benefits discussed below are applicable to both parties to a transaction involving partition, disaggregation, or lease of a license, but would only be available to the assignee in a full license assignment scenario, where the assignor is not licensed for that spectrum after consummation of the assignment. If we determine that the public interest would be served by including in the ECIP those transactions involving full license assignments, what safeguards should we put in place to ensure that these full license assignments achieve the intended benefits of the program?

ii. Rural-Focused Transactions

20. We also propose a rural-focused transaction approach that is intended to facilitate coverage to rural areas by tying ECIP benefits to construction and operation obligations, as further detailed below, furthering the Commission's goal of promoting the availability of advanced telecommunications services in rural areas.

21. *Eligible Entities.* In the *Notice,* the Commission sought comment on whether it should consider rule revisions to an expanded class of licensees beyond those Congress required the Commission to consider. The record reflects considerable support for expanding the scope of eligible entities. We agree with commenters that restricting program availability, and therefore program benefits and build-out incentives, to only small carriers, as defined in section 616 of the MOBILE NOW Act, would exclude numerous important spectrum users and provide fewer options for larger carrier licensees that seek to disaggregate, partition, or lease their unused spectrum.

22. Accordingly, we propose to include, by relying on our general Title III powers, any unaffiliated interested party that commits to serve a minimum amount of rural area under the proposed ECIP rural-focused transactions prong, if they meet the proposed requirements. This would expand upon the focus of the MOBILE NOW Act and include a substantial variety of stakeholders seeking to engage in transactions that we anticipate could result in increased spectrum usage and competition in rural areas, such as large or small carriers, common carriers, non-common carriers, Tribal Nations, critical infrastructure, and other entities (large or small) operating private wireless systems in rural areas. This expanded scope could incentivize transactions that accommodate a wide variety of spectrum users in rural areas facing challenges in accessing spectrum and result in more efficient and intensive spectrum use in rural areas. We seek comment on this flexible approach, including whether there is any reason we should restrict the types of licensees eligible for the ECIP benefits under this rural-focused prong of the program. Similar to our approach in small carrier and Tribal Nation transactions, we also seek comment on whether we should permit full license assignments within the rural-focused prong of the ECIP and, if so, how we should implement these types of transactions. We seek comment on the appropriate definition of affiliated in the context of rural-focused transactions.

23. For purposes of the rural-focused transaction approach and consistent with Congressional intent, we propose to adopt the MOBILE NOW Act definition of ''rural area,'' which is ''any area except (1) a city, town, or incorporated area that has a population of more than 20,000 inhabitants; or (2) an urbanized area contiguous and adjacent to a city or town that has a population of more than 50,000 inhabitants.'' We seek comment on this approach and any alternatives that might be more appropriate to achieve ECIP goals.

24. *Minimum Spectrum.* Consistent with our proposed approach to transactions involving covered small carriers and Tribal Nations described above, we also propose in the rural context that a qualifying transaction must designate a minimum of 50% of the licensed spectrum, for each license(s) included in the transaction. We seek comment on whether the 50% spectrum threshold makes enough spectrum available for the actual provision of rural-focused service. Would a lower or higher threshold percentage be more appropriate, particularly considering the increased scope of eligible entities seeking to deploy the spectrum? Are there alternative ways to ensure that there is sufficient spectrum to meet stakeholder needs? Further, is there a need to also specify a minimum threshold in terms of megahertz (in case the license has previously been disaggregated)? For licenses that authorize paired frequency bands, should an equal or minimum percentage of the spectrum be from each band?

25. *Minimum Qualifying Geography.* We propose that a qualifying transaction under this rural-focused prong must include a minimum amount of ''Qualifying Geography'' sufficient to cover at least 300 contiguous square miles of rural area, for market sizes of Partial Economic Areas (PEA) or smaller. We seek to incentivize transactions that will result in rural operation/service where most needed. We recognize that these underserved rural areas in many cases may not directly align with the Commission's licensed market areas, and may be near the edge, or even overlap, a market boundary. We therefore propose for this prong a required minimum square mileage of rural area, rather than a percentage of an assignor's market, which could unnecessarily mandate a substantially larger area than intended. The square mileage approach to establish Qualifying Geography provides flexibility for stakeholders to enter a transaction tailored to individual needs, which might involve rural area from more than one license. We propose 300 square miles as the most appropriate figure to ensure that

stakeholders include sufficient area in a transaction to warrant the substantial benefits afforded through the ECIP. Where a single transaction involving multiple licenses is needed to obtain the specific rural area sought, we propose to provide ECIP benefits to each license that contains some portion of the 300 square mile area. We seek comment on this approach, including the costs and benefits, and on any suggested alternatives. We understand that rural area could include unpopulated areas, which may otherwise be used for recreation, travel, commercial or business purposes. Should we limit eligibility to areas that have a census defined population? Does our proposed approach provide sufficient flexibility to structure transactions to meet stakeholder needs in rural areas? Conversely, would such a flexible approach result in gaming, for example, the inclusion of license(s) in a transaction solely to receive ECIP benefits that offer a *de minimis* amount of land as a percentage of the 300 square miles of Qualifying Geography? To discourage this potential outcome, should we require a minimum percentage of land within each license involved in a single transaction to meet the Qualifying Geography requirement? Alternatively, should parties be able to count multiple transactions with different parties involving partitions of the same license in aggregate to meet the Qualifying Geography threshold?

26. We also find it appropriate, given the Commission's current market sizes and goal of incentivizing meaningful service and operation in rural areas, to propose a minimum geography of 300 square miles of rural area for PEA markets and smaller markets. However, given the wide range in size of available markets subject to geographic area licensing, we seek comment on whether it would be appropriate to scale the amount of Qualifying Geography on a proportional basis in two ways. First, we recognize that there are variations in market sizes even for PEAs and smaller markets. For example, in approximately 3% of PEA markets (located in large Western states, including some in Alaska), 300 square miles represents less than 1% of the market land area. We seek comment on whether we should proportionally scale the minimum required Qualifying Geography upwards in these PEA markets to account for their larger size. Second, we seek comment on whether we should proportionally scale the minimum required Qualifying Geography upwards for all markets larger than PEAs. We note that the next largest market area size in relation to PEAs are Basic Economic Areas (BEA), where the average land area is almost twice the size of the average PEA. For Regional Economic Area Grouping (REAG) market areas, which can be comprised of several states, the market size on average is approximately 45 times larger than the average PEA. Would scaling in the large PEA context and/or for markets larger than PEAs prevent windfall benefits for transactions yielding nominal spectrum access and minimal rural buildout relative to the geographic size of the license receiving ECIP benefits? We seek comment on what the costs and benefits are with respect to any such proportional scaling and any suggested alternatives.

27. In addition, we seek comment on whether we should consider coverage on Tribal lands as an alternative to coverage of rural areas. We understand many Tribal lands are located in rural areas and to that extent might already qualify for ECIP benefits under this rural prong, but note that such lands may not be located in all instances in a contiguous 300 square mile area, or might be at least partially located in suburban or urban areas. Should we deem non-contiguous blocks of Tribal land that collectively reach the Qualifying Geography threshold sufficient to warrant ECIP benefits? In addition, we seek comment on the appropriate definition of Tribal lands for purposes of the ECIP.

b. Enhanced Competition Incentive Program Benefits

28. To properly incentivize licensees to make spectrum available to small carriers or Tribal Nations, and to engage in other rural-focused transactions, we propose three specific benefits for ECIP participation. Specifically, we propose to: Extend license terms for all parties to a qualifying transaction by five years; extend construction deadlines (both interim and final) by one year for all parties to a qualifying partition/disaggregation transaction and for lessors in a qualifying spectrum lease arrangement; and establish an alternate rural-focused construction requirement for certain transactions. We seek comment on these proposals, any alternative approaches, and associated issues, including whether there are appropriate incentives to encourage licensee participation in the program earlier in the term of the license.

i. License Term Extensions

29. The *Notice* sought comment on the appropriate incentives to achieve the MOBILE NOW Act's goal of encouraging licensees to partition, disaggregate or lease spectrum, including the incentive of license term extensions. Most commenters addressing the issue of incentives generally supported an extended license term benefit, with one commentor cautioning against conferring outsized benefits. We find it appropriate to propose a five-year license term extension for all parties involved in a qualifying partition/disaggregation transaction, and for all lessors entering into a qualifying spectrum leasing transaction, given that the lessor retains the renewal obligations. We believe this proposal will reduce regulatory burdens with less frequent renewal obligations and will properly incentivize secondary market transactions, particularly spectrum leases that are subject to the lessor's license term. We also propose recommended controls to avoid waste, fraud, and abuse as detailed below.

ii. Construction Extensions

30. The *Notice* also sought comment on whether modifications to the Commission's performance requirements, including a one-year extension in certain circumstances, would be likely to increase service to rural areas. Commenters expressed significant support for the temporal benefit of additional time to construct facilities, with some arguing that the difficulty and expense associated with building rural areas justifies the benefit. In addition, one commenter acknowledges the potential timing constraints for meeting construction requirements when spectrum is received in the middle of a license term. After review of the record, we propose that all parties to a qualifying transaction receive a one-year construction extension for both the interim and final construction benchmarks where applicable. We believe this approach strikes the right balance between incentivizing small carrier, Tribal Nation, and rural-focused transactions, while ensuring that assignees have adequate time to meet their construction milestones. We propose that this benefit would apply to both parties in a qualifying transaction involving partition or disaggregation. We also propose that this benefit would apply to the lessor in a qualifying spectrum lease arrangement, given that the lessor retains the obligations to comply with buildout and renewal requirements. We seek comment on these proposals and any associated costs and benefits. We recognize that the *Notice* sought comment on whether the Commission should limit any construction extension benefits to transactions filed no later

than six months prior to the construction deadline. After review of the record, and in the interest of promoting even late-term transactions that will ensure increased spectrum access and actual spectrum usage in rural areas, we propose not to establish a timeframe prior to a construction deadline within which an ECIP qualifying transaction must be filed. We seek comment on whether this flexible approach will incentivize parties to enter qualifying transactions, or whether an ECIP transaction filing cut-off date prior to relevant construction deadlines is necessary to prevent unintended results.

iii. Alternate Construction Benchmark for Rural-Focused Transactions

31. In response to the *Notice,* nearly all commentors supported modified performance requirements, noting that existing licenses that include significant portions of rural area are typically for large market areas, often leaving rural and remote areas underserved. Many commenters stated that modification of performance requirements would appropriately reflect the realities of deploying spectrum in rural, underserved, and unserved areas, and would incentivize the efficient allocation of spectrum.

32. To facilitate rural-focused transactions that achieve rural buildout, we propose to substitute an assignee's existing performance requirement with an alternative construction benchmark for those licenses acquired in an ECIP transaction qualifying under the rural-focused transaction approach described above. Specifically, the alternate construction benchmark would require 100% coverage of the Qualifying Geography (coverage to at least 300 contiguous square miles of rural area, for market sizes of PEA or smaller) that was the basis for the qualifying transaction, as well as the provision of service to the public, or operation addressing private internal business needs over that area. We clarify that our proposal for an alternate benchmark does not modify the timeframe for meeting the benchmark, which would remain the current deadline of the partitioned/disaggregated license, plus the one-year extension proposed in the above construction extension benefit section. As previously discussed, the proposed minimum geography seeks to ensure a reasonable investment in construction of facilities in rural areas to warrant the substantial ECIP benefits, while furthering the Commission's long-held goal of providing licensees with flexibility to determine the amount of spectrum licensees will occupy and the geographic area they will serve, and permitting stakeholders to build networks suited to the particular community needs. We seek comment on this approach, including the proposed benchmark, and the associated costs and benefits. Does this approach adequately ensure that an assignor does not enter into partitioning transactions solely for the purpose of reducing the area or population required to be covered under its service-specific performance requirements? In cases where the assignee ultimately fails to construct, should we require the assignor in a partition to meet its obligations consistent with the entire license area, by including in the relevant denominator the population/land of the partitioned-off area? Finally, we also seek comment on whether we should consider an alternative approach specifically tailored to the needs of Tribal Nations. What should the appropriate benchmarks include and what additional factors should be considered to facilitate the provision of service to Tribal Nations?

33. For assignees involved in partitioning and/or disaggregation where the interim performance requirement has not been met, we propose that this alternative construction benchmark would replace the existing interim performance requirement, and remove the final performance requirement, contained in the service rules for the particular license acquired in the ECIP transaction. Where the assignor has previously met the interim construction deadline, this alternative construction benchmark would replace the final construction obligation for the assignee. We propose that the assignor remain bound by the existing substantive coverage requirements for its license(s) (extended by one-year) involved in a qualifying ECIP transaction. We note, however, that this approach provides an additional incentive to the assignor that arguably will meet its performance requirements more easily following a partitioning/disaggregation transaction that reduces the geographic area/population it must cover. We seek comment on this approach, as well as the associated costs and benefits.

34. While our alternate construction benchmark proposal under ECIP focuses on parties individually satisfying performance requirements, the Commission's rules currently permit parties in a partition or disaggregation transaction to share responsibility for any service-specific requirements, and therefore share the penalties associated with failure to meet those performance requirements. We seek comment on whether the construct of a shared buildout requirement runs counter to the ECIP framework proposed herein and, if so, whether, we should afford this particular ECIP benefit solely to those parties that opt to separately meet their construction obligations. Do the ECIP benefits, as well as waste, fraud, and abuse protections, negate the need for the protections that shared responsibility provides? In the context of rural-focused transactions, does a shared responsibility unfairly burden one party over the other?

35. We do not propose an alternate construction benchmark for spectrum lease arrangements. For spectrum lease arrangements that qualify under ECIP, consistent with existing rules, we propose that a lessor would be able to attribute the construction and operation of its lessee's Qualifying Geography to its underlying performance obligations on its license. We believe that retaining this current pass-through benefit is sufficient (given the additional ECIP benefits conferred) to incentivize lessors to lease unused spectrum, particularly in uncovered rural areas. However, consistent with our approach to an assignor in the partition and/or disaggregation context, the lessor is nonetheless bound by the existing performance requirements set forth in the applicable service-specific rules. We seek comment on these tentative conclusions.

c. Enhanced Competition Incentive Program Waste, Fraud, and Abuse Protections

36. Given the substantial benefits being proposed for ECIP participants, and to ensure that stakeholders enter into transactions that will further our goals of increased spectrum access, rural service, and competition, we propose certain measures to protect against waste, fraud, and abuse of the program. We note that applicant character qualifications are part of our review of whether a transaction can be approved in the public interest, and we seek comment on the specific measures proposed below. We invite commenters to suggest alternative or additional measures that would ensure that the benefits we propose for ECIP participants are targeted and appropriate. For example, most of the measures we propose focus on assignees or lessees participating in ECIP transactions, but we welcome suggestions on whether additional restrictions should be imposed on ECIP participant assignors and lessors.

37. As stated above, we recognize that parties to an ECIP transaction are likely in many instances to meet the eligibility

requirements for both the small carrier/Tribal Nation transaction prong and the rural-focused transaction prong (*e.g.,* a covered small carrier might be interested in obtaining spectrum access to serve an area consisting of at least 300 rural square miles). Nonetheless, we recognize that open-ended program flexibility might have significant drawbacks. We therefore propose distinct paths to ECIP participation to meet the program's policy goals, to make program administration more feasible, and to afford targeted benefits while reducing instances of program abuse. We clarify our proposal that for each ECIP transaction, applicants must elect either prong 1 or prong 2, not both, and they may not, subsequent to application grant, modify the selected path. As a specific example, under our ECIP proposal, an assignee in a rural-focused transaction proposing to provide service to a partitioned area of at least 300 rural square miles under prong 2 is required to provide service or operate over that entire area by the extended construction deadline. Although that assignee may also be a covered small carrier by definition under prong 1, to ensure provision of the rural service to the Qualifying Geography for which ECIP benefits were granted, we do not propose to permit that assignee to later elect to provide service, in the alternative, to a percentage of population within its licensed area that might include more urban populations, as it might have had it elected to file its ECIP transaction under prong 1. We seek comment on this approach and potential costs and benefits.

38. *Holding Period.* First, we propose to impose a five-year holding period on licenses assigned through partitioning and/or disaggregation as part of ECIP transactions. Specifically, assignees of licenses obtained through ECIP transactions may further assign or lease, in whole or in part, those licenses to other entities only after the expiration of a five-year period commencing from the date of license issuance, and provided the assignee has met both the construction requirement and the three-year operational requirement proposed below (which also satisfies its interim performance benchmark). We seek comment on whether an alternative length of time is more appropriate for this holding period, considering the ECIP benefits conferred.

39. We also propose to apply a parallel ''holding period'' safeguard in the leasing context. Specifically, for spectrum leases subject to receiving ECIP benefits, we propose to require a mandatory five-year minimum lease term. We believe that this approach fosters transaction parity by not improperly incentivizing leases over other potential transactions. We seek comment on this proposal and the costs and benefits associated with this approach. In particular, we seek comment on how we should address leases terminated after less than five years. We recognize that the realities of the market often result in early termination of such agreements, but also that the benefits we propose for ECIP transactions could pose a significant risk of program abuse through leasing. Under what circumstances, if any, should such an early termination result in the lessor losing the benefits already applied to its license? Should such benefits be prorated based on how prematurely the lease was terminated? For example, if a lease is terminated after only two years, we could reduce by three years the lessor's license term, but maintain the performance requirement extension. What are the advantages and disadvantages of such an approach? Are there alternative methods of preventing sham leasing? On a related note, we seek comment on whether we should prohibit subleases or otherwise limit subleases to prevent program abuses.

40. To facilitate routine transfers, we propose to allow a *pro forma* transfer exception (such as pursuant to corporate reorganizations). We seek comment on whether we should allow further exceptions to the holding period restriction. For example, are there additional types of transactions, other than *pro forma* transfers, which should be permitted? Should we allow assignees or lessees under the ECIP to assign their licenses or leases to other ECIP-eligible parties that agree to be bound by the ECIP requirements? Are there any additional requirements or protections we should impose on such transactions? Commenters should discuss the costs and benefits of our proposed approach and any alternatives.

41. *Operational Requirement.* To ensure that spectrum is efficiently used in underserved rural areas, we propose an operational requirement on certain ECIP transactions. Specifically, we propose that the assignee or lessee of any transaction that qualifies as an ECIP rural-focused transaction would be required, for a minimum of three consecutive years, to either (1) provide and continue to provide service to the public; or (2) operate and continue to operate to address the licensee's private, internal communications needs. We propose that the level of service during this three-year operational period must not fall below that used (or intended to be used) to meet its construction requirement (for assignees) and ECIP eligibility (for lessees). This approach provides a uniform measure of operational status and verifiable service for a sustained period. We seek comment on this proposal, including the associated costs and benefits.

42. For assignees acquiring an ECIP license through partition and/or disaggregation, we propose that this operational period begin the earlier of the date of actual construction or the date of the interim construction deadline for that license, as modified by the ECIP. We propose that ECIP lessees must operate or provide service for three consecutive years during any period within the five-year minimum lease term. We seek comment on this proposal and any alternative structures for operational requirements, including the associated costs and benefits. Specifically, we seek comment on the interplay of this requirement with our concerns discussed above regarding early termination of leases. We also note that there is no current Commission requirement for lessees to independently certify construction of leased spectrum, as the lessor is responsible for meeting performance requirements and may include in its showing, at its option, any construction by its lessee. Considering the construction and operational requirements proposed in the ECIP, should we also impose a construction notification requirement on lessees that would allow us to verify that lessees have complied with ECIP construction and operational requirements, thereby increasing program accountability?

43. *Automatic Termination.* We also propose, consistent with the MOBILE NOW Act, automatic termination for any licenses assigned as part of an ECIP transaction where the licensee fails to meet the program requirements or construction requirements. Further, we propose that any licensee which was subject to such termination, or any lessee which fails to meet the program requirements, or affiliate of such an entity, would not be eligible to participate in the ECIP in the future. We seek comment on the appropriate definition of affiliate. We seek comment on our proposal, including the costs and benefits. We also seek comment on what measures could be implemented to prevent instances of program abuse, particularly with respect to lessors and assignors participating in the program. How should we address instances where we believe the assignor or lessor is potentially abusing the ECIP to obtain the program's benefits through assignments or leases to entities it

knows or should know cannot satisfy the program's obligations?

44. For example, should we extend program ineligibility and/or automatic license termination penalties to the assignor or lessor and its affiliates in situations where its assignee(s) or lessee(s) does not meet program requirements, including construction and operation obligations for which both parties to an ECIP transaction received benefits? Should we condition assignor/lessor program benefits on assignee/lessee performance of construction and continuity of service obligations, particularly in the rural-focused transactions context, to ensure that benefits do not accrue without provision of service or operation in these potentially underserved areas? For example, one approach is to not apply the five-year license term extension to an assignor's license where its assignee/lessee fails to timely construct or operate in the identified Qualifying Geography. We seek comment on the costs and benefits of such an approach. We also seek comment on whether, in the rural-focused transactions context to ensure service or operation, we should condition the assignor/lessor's one-year construction extension on an assignee/lessee's timely compliance with its construction deadline(s). We note that an assignor/lessor and assignee/lessee may have the same extended interim or final construction deadline under the ECIP, and therefore the Commission may not be aware of an assignee/lessee's failure to timely construct until after the expiration of the assignor/lessor's construction deadline, which the assignor/lessor may have relied upon in the construction of its license. How should we address this situation to strike the appropriate balance between properly incentivizing transactions and attempting to eliminate instances of program abuse?

45. *Limitations on Additional Benefits for Subsequent Transactions.* To prevent the benefits of the ECIP from undermining our renewal and construction policies through compounding extensions, we propose that once a license is the subject of a qualifying transaction and has received the benefits associated with the ECIP, that license, and any license created from it, will be ineligible to receive additional ECIP benefits. We propose to apply this restriction to the original license, as well as to licenses issued pursuant to a partition or disaggregation. In other words, if the license at issue in a given transaction has previously been involved in an ECIP transaction, it is not eligible for any more ECIP benefits. We believe this will prevent abuse resulting from leveraging the same spectrum or geography to gain repeated license term or construction extensions. We seek comment, in the alternative, on whether a licensee should instead be eligible for ECIP benefits once per license term.

46. We recognize that this proposal does not provide incentives for licensees to enter into subsequent assignments or leases of their unused spectrum rights, and that there may be situations where such subsequent transactions can provide public interest benefits without undermining our proposed program policies. For example, Licensee A may wish to partition an area to Licensee B (receiving benefits under the ECIP) and also partition another area to Licensee C; are there circumstances in which Licensee C should receive ECIP benefits beyond those already afforded to the license to be partitioned? We seek comment on whether we should permit these types of subsequent transactions, what benefits are appropriate, and how we might ensure that our renewal and construction policies are not frustrated through multiple transactions.

47. *Restrictions on Leasing and Subleasing of Spectrum Rights Obtained Through the ECIP.* Finally, we seek comment on how to approach leasing and subleasing of spectrum rights obtained through ECIP transactions. We recognize that subsequent leases by ECIP assignees and lessees could be used to circumvent our eligibility rules and holding period protections. For example, an assignee of an ECIP transaction could lease its spectrum rights to a third party, including the assignor in the ECIP transaction, extending the license term and construction deadlines, but not resulting in the public interest benefits intended by the ECIP. However, leasing is also an important tool in facilitating spectrum being put to use. How should we prevent this kind of abuse while still permitting leasing where it is in the public interest? Should we only permit leases (and subleases) of such rights to other ECIP-eligible entities? What are the costs and benefits of this approach or alternatives?

48. *Report.* The ECIP seeks to promote competition and increased spectrum access for small carriers and Tribal Nations and to increase the availability of advanced telecommunications services in rural areas. These are critical Commission goals, and we have proposed substantial incentives to encourage participation by our licensees. Because of the importance of these goals and the nature of these incentives, we propose to direct the Wireless Telecommunications Bureau (Bureau) to conduct a review of the ECIP, with an opportunity for interested stakeholders to provide input, so that we may assess the program's effectiveness. We propose that, after an appropriate period of time not to exceed five years from the effective date of the final order adopting the program, the Bureau would submit a public report on the ECIP to the Commission. We propose that the report would include data about ECIP participation by eligible stakeholders, including the number of secondary market transactions, as well as the geographic areas and spectrum made available, under each prong of the program. We further propose that the report would include recommendations about rule or policy changes to increase the effectiveness of the program. In addition, we propose that the report would be publicly available, and that the Bureau could also prepare a non-public version with commercially sensitive information, if included. We seek comment on our proposals. We also seek comment on any other information that stakeholders advocate for inclusion in this report.

d. Alternative to Population-Based Construction Requirements

49. The *Notice* sought comment on a range of issues related to facilitating increased spectrum access and increased availability of telecommunications service in rural areas. As discussed above, commenters generally were supportive of Commission action to incentivize transactions to meet these key goals, including the MOBILE NOW Act's focus on possible benefits of modified construction requirements. In addition, commenters expressed additional concerns that our current performance rules across virtually all WRS are based on providing coverage and offering service to a percentage of the population in the licensed geographic area, which typically results in more urban-focused service and a lack of service to rural areas. Commenters urge the Commission to provide an alternative to population-based performance benchmarks that will better meet the business needs of a variety of stakeholders, including those providing service to rural subscribers, or that operate telecommunications systems in conjunction with businesses located in less populated rural areas. As WISPA explains, ''standards based on population coverage encourage licensees to satisfy the requirement for a large-footprint license by covering only the most populated areas,'' often to the exclusion of less populated areas like rural America. This approach to

build-out requirements can incentivize licensees to focus their deployment efforts on densely populated areas to quickly satisfy their construction requirements, which can leave rural Americans underserved or unserved entirely and can result in a ''surplus of unused spectrum, usually in less densely populated areas.'' Further, commenters argue that having pre-approved construction requirements offers a greater level of certainty for licensees, which would reduce concerns about the risks involved in leasing and/or partitioning arrangements in particular.

50. We recognize that providing alternatives to construction requirements to a wide range of stakeholders can incentivize acquisition of licenses by entities that will deploy innovative spectrum use models and reach underserved areas. We believe that such an alternative option also can serve the public interest by providing all licensees more certainty as to regulatory requirements when planning to deploy networks, even for licensees acquiring spectrum directly from the Commission. We therefore seek comment on providing all WRS flexible use licensees an alternative construction requirement to population-based construction requirements, including for licenses acquired through a transaction (qualifying for ECIP benefits or not) or licenses newly issued to an auction winner. We seek to develop a robust record on the most beneficial alternatives to achieve more efficient use of spectrum, particularly in underserved rural areas.

51. As noted, the Commission has adopted population-based performance requirements in most flexible use radio services. In so doing, the Commission largely departed from providing the ''substantial service'' option that was available to many licensees in certain services. This option allowed licensees to provide an alternate demonstration as to how its spectrum was used in the public interest where population benchmarks either could not be met or were an inaccurate measure of actual spectrum usage. We therefore seek comment on whether to provide a ''substantial service'' type alternative as has previously been used in many different services. We recognize that use of the subjective term ''substantial'' provides flexibility to licensees, but it can also create uncertainty over how to meet the standard and how to enforce the standard. We therefore seek comment on the appropriate definition of substantial service or an appropriate variation of this concept more tailored to individual licensee needs.

52. We seek detailed comment on how we can best accommodate particular use cases that are less suited to meeting population coverage requirements, for example, critical infrastructure, Internet of Things applications, and other private internal uses (*e.g.,* oil and gas, agricultural, industrial, railroads). How should we tailor performance requirements to these types of spectrum uses that do not directly serve the public through ubiquitous mobile service to subscribers in a manner that nonetheless facilitates enforcement of buildout obligations in the public interest? Should we establish specific safe harbors to provide more certainty to stakeholders, as some commenters in this record suggest? What is an appropriate safe harbor for these types of use cases? Should we only apply (or modify) a safe harbor in rural areas, recognizing that the Commission adopted a rural safe harbor for certain radio services in 2004? Would establishing band-specific alternative metrics or safe harbors aid in incentivizing partitioning, disaggregation, or leasing with a range of diverse use cases and in particular, rural providers? How should we accommodate licensees seeking either to provide services or to meet internal connectivity needs through fixed, rather than mobile, operations? Commenters addressing these issues should provide specific examples and also address the costs and benefits of any recommended approach.

53. If the Commission determined that the public interest would not be served by adopting the substantial service concept on a more widespread basis, we also seek comment on whether there are more suitable alternative metrics for flexible use licenses in lieu of population coverage. What are the appropriate alternative performance benchmarks for these types of spectrum use cases, whether fixed or mobile or both? Should we apply a specific geographic area coverage benchmark to these market areas? How could performance requirements be tailored to meet stakeholder business needs, while ensuring that business decisions do not result in spectrum lying fallow in potentially large areas of a market?

e. Reaggregation of Spectrum Licenses

54. Under our current rules, while licensees may partition and disaggregate their licenses through spectrum transactions, there is no provision for reaggregating spectrum, even when the partitioned or disaggregated portions of an original market area are acquired by a single entity. In the *Notice,* the Commission sought comment on whether to permit flexible use licensees to reaggregate licenses that have been partitioned and/or disaggregated up to a maximum of the original market/channel block size, provided certain regulatory requirements have been fulfilled. The Commission asked whether such an approach would increase the incentives of parties to lease or sell spectrum, thereby furthering the Congressional and Commission policy goals of increased spectrum access for small carriers and increased rural service. Many commenters acknowledge the public interest benefits of permitting partitioning/disaggregation, but also note that business circumstances may subsequently necessitate license reaggregation, which they argue should therefore be permitted by rule with a clear licensing path for doing so. For example, R Street suggests that ''[a]llowing reaggregation is essential to well-functioning markets,'' and that ''[p]ermitting free reaggregation alongside disaggregation would not only allow more flexibility in the use of spectrum over time, it would also incentivize initial licensees to participate in the secondary market in the first place.'' CTIA and Google also support this flexible approach. Google agrees that the reaggregation cap should be the original size of the market area, while RS Access suggests that ''the Commission's rules should not restrict aggregation to instances where the licensee is merely reaggregating previously disaggregated or partitioned spectrum . . . the rules should permit the aggregation of licenses that were not previously disaggregated or partitioned, provided a licensee has satisfied the substantial service requirements for each of the licenses.''

55. Some commenters, however, oppose a reaggregation process on the grounds that it would create the ''potential for abuse by large carriers'' because it would ''encourage . . . licensees to use partitioning to avoid their buildout obligations by partitioning non-desirable or hard-to-serve spectrum'' followed by a later reaggregation and consequent spectrum warehousing. Similarly, GeoLink and WISPA argue that allowing reaggregation would undermine the goal of increasing spectrum access by small and rural carriers.

56. The *Notice* sought comment on the costs and benefits of permitting reaggregation, as well as whether measures were necessary to prevent abuse, particularly evasion of any performance requirements associated with partitioned or disaggregated licenses subject to a request for

reaggregation. Stakeholders largely agree that there were substantial administrative benefits associated with permitting reaggregation, including those related to construction requirements, renewal showings, continuous service requirements, and the need to maintain up-to-date information in the Commission's Universal Licensing System. Commenters also discuss the added costs associated with maintaining multiple licenses that were formerly a single license and the extent to which this could discourage disaggregation in the first place. R Street does not favor construction requirements, but comments that ''[i]f the Commission is committed to keeping construction requirements, it could avoid this difficulty by allowing reaggregation only after the original construction requirements for the aggregate license area have been met.'' Google suggests that, ''[t]o the extent that possible manipulation of disaggregation and reaggregation to evade regulatory construction deadlines is a concern, the Commission could condition reaggregation on building out the entire reaggregated service area.''

57. After review of the record, we propose to permit license reaggregation with appropriate safeguards. Our goal is to further the public interest by providing a path to removing unnecessary regulatory barriers to facilitate secondary market transactions and easing administrative burdens for stakeholders and the Commission. Permitting reaggregation can make our licensing information easier to use through a more flexible, yet accountable, data policy for geographic spectrum licenses. The reaggregation proposal described below, however, is not intended as an overall reexamination of the Commission's adopted approaches on key licensing issues related to WRS licenses, including performance requirements, renewal and associated continuing service obligations, and permanent discontinuance of operations.

58. Accordingly, we propose to permit licensees to seek reaggregation of partitioned and/or disaggregated portions of licenses up to the original geographic size and spectrum band(s) for the type of license. We believe that this approach is the appropriate scope for reaggregation requests and that expanding this proposal to permit consolidation of market licenses not previously partitioned or disaggregated, as one commenter suggests, would unnecessarily undermine the established WRS licensing framework and complicate our attempt to ease administrative burdens. As a safeguard against potential abuses, we propose to require that, prior to seeking license reaggregation, the entity requesting reaggregation must ensure that each license to be reaggregated has: (1) Met all performance requirements (both interim and final benchmarks); (2) been renewed at least once after meeting any relevant continuing service or operational requirements, if applicable; and (3) not violated the Commission's permanent discontinuance rules. We seek comment on our proposed approach to preventing potential abuses of our essential licensing requirements, including whether we should consider further safeguards such as requiring any additional certifications from applicants seeking license reaggregation.

59. To implement our proposed reaggregation approach, we propose that a licensee holding multiple active licenses in the same radio service and for the same channel block may seek reaggregation by: Filing FCC Form 601, identifying the licenses to be reaggregated, and certifying that the performance requirements, renewal requirement, and lack of permanent discontinuance conditions have been met. Under this proposal, the licenses must be active and held under the same FCC registration number (FRN). To simplify the administrative process associated with this effort, we propose to treat this as a separate filing from any transactions that may be necessary to transfer the licenses under the same FRN and to prohibit combining a proposed reaggregation with any other transaction in the same FCC 601 application. We recognize that the subdivided licenses within a partitioned/disaggregated market may, over the course of license term(s), be the subject of additional license conditions, rights (such as granted waivers), and other parameters that make them dissimilar. We seek comment on this approach and on how best to reflect those unique parameters on the reaggregated license. For example, if one of the licenses (but not the others) authorizes operation at higher power levels through a granted waiver, should the waiver rights and conditions be transferred to the reaggregated license (but only for the geographic area and spectrum associated with the license subject to waiver)? Alternatively, to simplify the process, should we prevent reaggregation in cases where the licenses do not have identical rights and conditions? We seek comment on how we should address these types of circumstances, as well as the costs and benefits of any suggested alternatives.

f. Other Considerations

60. *Open Radio Access Networks.* Over the last several years, the Commission has worked closely with federal partners, equipment manufacturers, carriers, and other parties on the important issue of securing the United States' communications networks, in particular in the area of supply chain risk management. In March, 2021, the Commission issued a *Notice of Inquiry* into one potential method of promoting secure communications networks: Open Radio Access Networks (Open RAN). Open RAN has the potential to allow carriers to promote the security of their networks while driving innovation, in particular in next-generation technologies like 5G, lowering costs, increasing vendor diversity, and enabling more flexible network architecture. Comments received in response to that *Notice of Inquiry,* as well as discussions enabled by the Commission's Open RAN Solutions Showcase, held on July 14–15, 2021, show that these technologies have great promise.

61. To that end, we seek comment on whether and how we should factor the use of Open RAN technologies into the ECIP. For example, should we tie ECIP benefits to the use of Open RAN in network deployment? If so, what level of use should we require, and how would parties demonstrate their use in their application? Should this requirement apply to assignors and lessors, and assignees and lessees, or only to some parties? Alternatively, how could we further incentivize ECIP participants to explore Open RAN deployments? Should we retain our proposed ECIP eligibility requirements, and provide additional benefits to parties which use Open RAN in their networks? If so, what should those additional benefits be? Should we make these benefits available to both assignors/lessors and assignees/lessees, if both sides of the transaction demonstrate their use of these technologies?

62. *Use or Share Spectrum Access Models.* Many commenters proposed adoption of varying spectrum rights models with the ''use or share'' model emerging prominently in the record. This spectrum rights model typically involves enabling temporary or opportunistic shared access to unused portions of a licensed band in which a licensee has not begun operations.

63. The Open Technology Institute at New America and Public Knowledge's joint comment references various implementations of the use or share

model, in particular noting how this model is employed at 3.5 GHz (via Spectrum Access Systems) and 600 MHz (via white spaces databases). We seek comment on ''use or share'' models generally, and in particular on whether there are voluntary mechanisms or incentives that we could put into place to promote sharing, whether as part of the ECIP or more widely. We seek comment on whether such an approach could increase spectrum access and/or promote competition, and how these mechanisms could be implemented. We also seek comment on incentives to promote sharing by licensees with opportunistic users on a secondary basis. We recognize that dynamic sharing has been managed effectively through spectrum access systems and databases in some bands, and we seek comment on the suitability for these systems to facilitate sharing in other bands. We seek comment also on whether there are particular scenarios in which licensees and sharing proponents might self-coordinate without an access system or database, how that would function, and how we might encourage such arrangements. We seek comment on the costs and benefits of such approaches to sharing.

64. *Digital Equity and Inclusion.* Finally, the Commission, as part of its continuing effort to advance digital equity for all, including people of color, persons with disabilities, persons who live in rural or Tribal areas, and others who are or have been historically underserved, marginalized, or adversely affected by persistent poverty or inequality, invites comment on any equity-related considerations and benefits (if any) that may be associated with the proposals and issues discussed herein. Specifically, we seek comment on how our proposals may promote or inhibit advances in diversity, equity, inclusion, and accessibility, as well the scope of the Commission's relevant legal authority.

IV. Procedural Matters

65. *Paperwork Reduction Act Analysis.* This *Further Notice of Proposed Rulemaking* may contain new or modified information collection(s) subject to the Paperwork Reduction Act of 1995. If the Commission adopts any new or modified information collection requirements, they will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, we seek specific comment on how we might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

66. *Regulatory Flexibility Act.* The Regulatory Flexibility Act of 1980, as amended (RFA), requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that ''the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' Accordingly, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) concerning potential rule and policy changes contained in this *Further Notice of Proposed Rulemaking.* The IRFA is contained in Appendix B to the *Further Notice of Proposed Rulemaking.*

V. Ordering Clauses

67. Accordingly, *it is ordered,* pursuant to sections 1, 4(i), 303, and 310(d) of the Communications Act of 1934, as amended, and section 616 of the Making Opportunities for Broadband Investment and Limiting Excessive and Needless Obstacles to Wireless Act, 47 U.S.C. 151, 154(i), 303, 310(d), 1506, that this *Further Notice of Proposed Rulemaking* is *hereby adopted.*

68. *It is further ordered* that, pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, 47 CFR 1.415 and 1.419, interested parties may file comments on the *Further Notice of Proposed Rulemaking* on or before 60 days after publication in the **Federal Register**, and reply comments on or before 90 days after publication in the **Federal Register**.

69. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this *Further Notice of Proposed Rulemaking,* including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 1

Practice and procedure, Wireless radio services Applications and proceedings, Spectrum leasing.

Federal Communications Commission.

Marlene Dortch,

Secretary.

Proposed Rules

The Federal Communications Commission proposes to amend 47 CFR part 1 as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 47 U.S.C. ch. 2, 5, 9, 13; 28 U.S.C. 2461, unless otherwise noted.

■ i. Amend § 1.950 by revising the heading of paragraph (c) and adding paragraph (i) to read as follows:

§ 1.950 Geographic partitioning and spectrum disaggregation.

* * * * *

(c) *Filing requirements for partitioning and disaggregation.* * * *

* * * * *

(i) *Reaggregation of licenses.* (1) A licensee of multiple licenses which were disaggregated or partitioned, pursuant to § 1.950, from the same Wireless Radio Service License may apply to reaggregate those licenses into one new license.

(i) Parties may not reaggregate licenses unless all licenses to be aggregated were once part of the same Wireless Radio Service license.

(ii) All performance requirements for the licenses to be combined through reaggregation must have been completed and certified as required prior to the filing of the application.

(iii) Each of the licenses to be combined through reaggregation must have been renewed at least once since the completion and certification of all performance requirements.

(iv) None of the licenses being combined may have violated the Commission's permanent discontinuance rules, as applicable to that license.

(2) A licensee does not need to reaggregate all licenses which were once part of the original Wireless Radio Service license in order to qualify for reaggregation.

(3) Licensees seeking approval for reaggregation of licenses must apply by filing FCC Form 601. Each request which involves geographic area aggregation must include an attachment defining the boundaries of the licenses being aggregated by geographic coordinates to the nearest second of latitude and longitude, based upon the 1983 North American Datum (NAD83). The licenses must all be active in the Commission's licensing system, and held by the same licensee under the same FCC Registration Number.

■ 2. Add § 1.961 to read as follows:

§ 1.961 Enhanced competition incentive program.

(a) *Definitions*—(1) *Covered small carrier.* A covered small carrier is a carrier (as defined in section 3 of the

Communications Act of 1934 (47 U.S.C. 153)) that has not more than 1500 employees (as determined under § 121.106 of title 13, Code of Federal regulations, or any successor thereto) and offers services using the facilities of the carrier.

(2) *Enhanced Competition Incentive Program.* The Enhanced Competition Incentive Program allows licensees to assign or lease some of their spectrum rights pursuant to a given Wireless Radio Service license as part of a qualifying transaction, as defined in paragraph (b) of this section, and in return receive certain benefits, as defined in paragraph (c) of this section.

(3) *Qualifying transaction.* A qualifying transaction under the Enhanced Competition Incentive Program, as defined in paragraph (b) of this section.

(4) *Rural area.* A rural area is any area other than:

(i) A city, town, or incorporated area that has a population of more than 20,000 inhabitants; or

(ii) An urbanized area contiguous and adjacent to a city or town that has a population of more than 50,000 inhabitants.

(5) *Tribal Entity.* A Tribal entity is any federally-recognized American Indian Tribe or Alaska Native Village, as well as consortia of federally recognized Tribes and/or Native Villages, or other entities controlled and majority-owned by such Tribes or consortia.

(b) *Eligibility.* (1) In order to qualify for benefits under the Enhanced Competition Incentive Program, a qualifying transaction must partition or disaggregate (pursuant to § 1.950) or lease (pursuant to Subpart X of this part) a minimum of 50% of the frequencies authorized by a Wireless Radio Service license to an unaffiliated entity.

(2) That transaction must also involve either:

(i) An assignee or lessee which is a covered small carrier or Tribal Nation which receives rights to a minimum of 25% of the Wireless Radio Service license area; or

(ii) Any assignee or lessee that proposes to cover at least 300 contiguous square miles of rural area for license areas consisting of a Partial Economic Area or smaller, as defined in § 27.6(a) of this chapter. The transaction may not involve a party which has been previously found to have failed to comply with the requirements of the Enhanced Competition Incentive Program, whether as an assignee or a lessee.

(3) The transaction may not involve any license which has previously been included in a qualifying transaction and received benefits under the Enhanced Competition Incentive Program.

(c) *Incentives.* Parties to a qualifying transaction will be eligible to receive the following benefits.

(1) *License term extension.* The license term for all licenses involved in a qualifying transaction will be extended by five (5) years. If other Commission action, whether by Order or by rule, would otherwise have modified the license term for the party's license, this increase would be in addition to that modification.

(2) *Construction extension.* The period in which each party is required to demonstrate compliance with the relevant interim and/or final performance requirements of the license will be extended by one (1) year. This will apply to all relevant performance deadlines applicable to this license but will have no impact on any license not covered by the qualifying transaction.

(3) A*lternative construction requirements.* The assignee of a disaggregated or partitioned license in a qualifying transaction under clause (b)(2)(ii) of this section which involves the assignment of, and commitment to cover and serve, a qualifying geography of rural area will substitute the construction requirements which apply to this license with actual coverage over the entirety of the qualifying geography that was the basis for the qualifying transaction, as well as the provision of service to the public, or operation addressing private internal business needs over that area. The assignor of such license remains subject to its original construction requirements, as modified in this section.

(d) *Filing requirements.* Parties seeking to participate in the Enhanced Competition Incentive Program must file for a partition or disaggregation pursuant to § 1.950 or a spectrum lease pursuant to subpart X of our rules. As part of the application, the parties should state whether the transaction qualifies under clause (b)(2)(i) or (ii) of this section, show their satisfaction with all relevant eligibility requirements, and request participation in the program.

(e) Protections against waste, fraud, and abuse.

(1) *Operating requirements.* Licenses assigned through the Enhanced Competition Incentive Program pursuant to paragraph (b)(2) of this section must provide service for a period of at least three (3) years, commencing no later than the next construction deadline for the license (as modified by this program). Lessees of Enhanced Competition Incentive Program transactions must provide service for a period of at least three (3) years during any period within the five (5) years of that lease. The service for licensees and lessees must not fall below the level of service used (or which will be used) to meet its construction requirement or by which it qualifies for participation in the program.

(2) *Holding period.* (i) Licenses assigned through the Enhanced Competition Incentive Program must be held for a period of at least five (5) years following grant of the assignment application. Leases made through the Enhanced Competition Incentive Program must be for a minimum of five years and remain in effect for the entire term of the lease and may not be assigned to another party.

(ii) Licenses assigned through the Enhanced Competition Incentive Program may not be assigned, even after five (5) years following the grant of the assignment application, unless the underlying construction and operating requirements imposed, either through the Enhanced Competition Incentive Program or by other rule, have been satisfied.

(iii) These assignment restrictions do not apply to *pro forma* transfers pursuant to § 1.948(c)(1).

(5) *Automatic termination.* If the licensee of a license assigned pursuant to the Enhanced Competition Incentive Program fails to meet performance requirements, including requirements imposed by this paragraph and those imposed by other Commission rules, that license shall be automatically terminated without further notice to the licensee.

[FR Doc. 2021–27493 Filed 12–28–21; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54

[WC Docket No. 21–450; DA 21–1453; FRS 62653]

Wireline Competition Bureau Seeks Comment on the Implementation of the Affordable Connectivity Program

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In the document, the Wireline Competition Bureau (Bureau) seeks comment on the requirements for the Affordable Connectivity Program and a timeline for its rapid implementation.

DATES: January 5, 2022. If you anticipate that you will be submitting comments, but find it difficult to do so within the

period of time allowed by this document, you should advise the contact listed in the following as soon as possible.

ADDRESSES: Pursuant to § 1.419 of the Commission's rules, 47 CFR 1.419, interested parties may file comments on or before December 28, 2021. All filings should refer to WC Docket No. 21–450. Filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. Comments may be filed by paper or by using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121 (1998).

▪ *Electronic Filers:* Comments may be filed electronically via ECFS: *http://www.fcc.gov/ecfs.*

▪ *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail.

• Filings can be sent by commercial overnight courtier or by first-class or overnight U.S. Postal Service mail. Due to the COVID–19 pandemic, the Commission closed its hand-delivery filing location at FCC Headquarters effective March 19, 2020. As a result, hand or messenger delivered filings in response to this Public Notice will not be accepted. Parties are encouraged to take full advantage of the Commission's electronic filing system for filing applicable documents. Except when the filer requests that materials be withheld from public inspection, any document may be submitted electronically through the Commission's ECFS. Persons that need to submit confidential filings to the Commission should follow the instructions provided in the Commission's March 31, 2020 public notice regarding the procedures for submission of confidential materials. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

▪ Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.

▪ U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street NE, Washington, DC 20554.

People with Disabilities. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice).

Ex Parte Rules. This proceeding shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written ex parte presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in these proceedings should familiarize themselves with the Commission's *ex parte* rules.

FOR FURTHER INFORMATION CONTACT: For further information, please contact Eric Wu, Telecommunications Policy Access Division, Wireline Competition Bureau, at (202) 418–7400 or by email at *eric.wu@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Bureau's Public Notice (Notice) in WC Docket No. 21–450, released on November 18, 2021. The full text of this document is available for public inspection on the Commission's website at: *https://www.fcc.gov/document/fcc-seeks-comment-new-affordable-connectivity-program.*

I. Introduction

1. On November 15, 2021, President Biden signed the Infrastructure Investment and Jobs Act (Infrastructure Act or Act), which modifies and extends the Emergency Broadband Benefit Program (EBB Program) to a longer-term broadband affordability program to be called the Affordable Connectivity Program (sometimes referred to as ''ACP''). The Infrastructure Act directs the Commission to undertake a proceeding to adopt final rules for this modified program. Consistent with this directive, the Bureau herein seeks comment on the requirements for the Affordable Connectivity Program and a timeline for its rapid implementation.

2. The Commission established the rules for and structure of the EBB Program earlier this year based on the framework provided in the Consolidated Appropriations Act. The text of the Infrastructure Act establishing the Affordable Connectivity Program relies in large part on the EBB Program directives in the Consolidated Appropriations Act by overlaying new Affordable Connectivity Program requirements on top of EBB Program requirements, as well as by providing additional requirements. The Infrastructure Act, however, retains many of the EBB Program requirements found in the Consolidated Appropriations Act. The Infrastructure Act, for example, does not modify the procedural and rulemaking timeline requirements contained in section 904(c) of the Consolidated Appropriations Act, and the Bureau interprets section 904(c) as also pertaining to the promulgation of rules for the Affordable Connectivity Program. Therefore, for purposes of this rulemaking, the Bureau must initiate this rulemaking within five days of enactment of the Infrastructure Act, must set a 20-day public comment period followed by a 20-day period for replies, and the Commission must resolve the rulemaking within 60 days of enactment.

3. The Infrastructure Act also directs the Commission to effectuate for the Affordable Connectivity Program specified changes, such as to EBB Program eligibility and the program benefit amount, by the effective date, which the statute defines as the date the Commission notifies Congress that all EBB Program funds have been fully expended or December 31, 2021, whichever is earlier. The Bureau does not project EBB Program funds will be fully expended by December, 31, 2021,

and therefore, for the purposes of this rulemaking, the Bureau considers December 31, 2021 to be the effective date of the Affordable Connectivity Program and the date on which the EBB Program ceases. The Bureau requests that stakeholders include in their comments how the changes to program eligibility and benefit amount impact the providers, consumer groups, governmental agencies and others as they prepare to support outreach for and enrollment in the Affordable Connectivity Program. The Bureau also urges commenters to suggest ways in which the Commission could facilitate these program changes so as to minimize any potentially disruptive impacts on low-income consumers.

4. Pursuant to the Infrastructure Act, the amendments removing and adding certain qualifying eligibility programs, changing the benefit level, and making other modifications to the EBB Program requirements are ''delayed amendments'' that do not take effect immediately. The Infrastructure Act also provides for a 60-day transition period for ''households that qualified'' for the EBB Program before the effective date that would otherwise see a reduction in their benefit as a result of the changes made through the delayed amendments. Accordingly, the 60-day transition period for the Affordable Connectivity Program will start on December 31, 2021 for all households enrolled in the EBB Program before the effective date. During the transition period, households currently enrolled in the EBB Program will continue to receive the same benefit level they are receiving as of the effective date, thereby ensuring a seamless migration for all EBB Program households to the Affordable Connectivity Program. Moreover, the Affordable Connectivity Program will also begin to accept enrollments on the effective date. To ensure an orderly transition, the Bureau will provide additional guidance to participating providers, households, outreach partners, and other stakeholders concerning the end of the EBB Program, the 60-day transition period, the Affordable Connectivity Program requirements, and any other guidance necessary for enrollment of households in the Affordable Connectivity Program.

II. Discussion

5. The Infrastructure Act does not alter the definition of participating provider or the framework through which providers may seek to participate in the Affordable Connectivity Program. Like participation in the EBB Program, provider participation in the Affordable Connectivity Program is voluntary. For both the Affordable Connectivity and EBB Programs, a ''participating provider'' is defined as a broadband provider that is either designated as an eligible telecommunications carrier (ETC) or a provider that seeks approval from the Commission to participate in the program. To participate in the EBB Program, ETCs and their affiliates in the states or territories where the ETC is designated were required to file the appropriate information with the Universal Service Administrative Company (USAC) and did not need to seek approval from the Commission in those states. All other broadband providers needed to seek approval from the Commission to participate in the EBB Program.

6. Providers that have not been designated as ETCs by the states or the Commission were required, in order to participate in the EBB Program, to file an application with the Commission that meets the program requirements and must be approved by the Commission. The Infrastructure Act leaves these requirements unchanged for providers seeking to participate in the Affordable Connectivity Program. Moreover, the Infrastructure Act does not modify or eliminate the requirement that the Commission ''automatically approve as a participating provider a broadband provider that has an established program as of April 1, 2020, that is widely available and offers internet service offerings to eligible households and maintains verification processes that are sufficient to avoid fraud, waste, and abuse.''

7. The Commission established an expedited and automatic approval process in the EBB Program. The Bureau proposes that all existing EBB Program providers, even those that lack ETC designations or are not affiliated with an ETC, would not need to file or resubmit a completely new application to participate in the ACP prior to resubmitting their ACP election notice to USAC. Only a provider that did not participate in the EBB Program and is not an existing ETC or affiliated with an ETC would need to file an entirely new FCC approval application. The Bureau seeks comment on this proposal.

8. As noted in this document, the Consolidated Appropriations Act also required that the Commission ''automatically approve as a participating provider any broadband provider that has an established program as of April 1, 2020 that is widely available and offers internet service offerings to eligible households and maintains verification processes that are sufficient to avoid fraud, waste, and abuse.'' In the EBB Program, the Commission implemented this statutory obligation by allowing service providers to file ''automatic applications'' where the provider's application would be reviewed on a priority basis if it established it had a pre-existing program as of April 1, 2020 that offered discounted service for certain eligible households. In defining what constitutes an ''established program'' the Commission adopted a ''broad interpretation,'' finding that ''any eligible broadband provider that maintains an existing program that was made available by April 1, 2020 to subscribers meeting at least one of the criteria in the Consolidated Appropriations Act's definition of an eligible household'' meets the requirements of an established program. The Commission explained that the principal consideration in determining what constitutes an ''established program'' for automatic approval is whether EBB eligible subscribers would have received a financial benefit through either reduced rates or rate forbearance. Further, a provider must also show its program is ''widely established'' by demonstrating the program is offered to subscribers in a substantial portion of the provider's service area in the jurisdiction for which it is seeking approval. The established program must have been available by April 1, 2020 to subscribers meeting at least one of the criteria in the definition of an EBB Program eligible household. Specifically, providers offering broadband households discounted rates based on criteria such as low-income status, loss of income, participation in certain federal, state, or local assistance programs, or other means-tested eligibility criteria qualify for this automatic approval process. Additionally, the Commission made eligible for automatic approval providers that made commitments to keep low-income subscribers connected during the pandemic and offered widely available bill forbearance or forgiveness programs beginning no later than April 1, 2020 and continuing through the end of the EBB Program. The Bureau proposes to retain the process developed for review and approval of automatic applications for such non-ETC providers, and the Bureau seeks comment on that proposal.

9. The Infrastructure Act makes several changes to the ways households can qualify for the Affordable Connectivity Program. In the EBB Program, a household may qualify if it meets the requirements of a provider's existing low-income or COVID–19 program, subject to the requirements of

the provider's approved verification process. However, under the Affordable Connectivity Program, eligibility for a provider's COVID–19 program no longer qualifies a household to receive ACP benefits. Additionally, the Infrastructure Act removes eligibility for households that qualified based on having experienced a substantial loss of income since February 29, 2020. Given these changes, the Bureau seeks comment on how the Commission should revise the process for determining whether a provider's ''established program'' qualifies it for automatic approval to become a participating provider in the Affordable Connectivity Program. In keeping with the directive of Congress, the Bureau proposes to modify the requirements of what constitutes an ''established program'' to reflect the removal of COVID–19-specific response programs and other short-term bill forbearance or forgiveness programs. Accordingly, a provider seeking to participate in the Affordable Connectivity Program that did not participate in the EBB Program or is otherwise not an ETC or affiliated with an ETC can demonstrate an ''established program'' for automatic approval by submitting information demonstrating that it maintains an existing low-income program that was made available by April 1, 2020 to subscribers meeting at least one of the criteria in the revised definition of an eligible household. The Bureau proposes, consistent with the Infrastructure Act's modifications to the statute, that to qualify for automatic approval, providers must demonstrate that they are offering broadband subscribers discounted rates based on criteria such as low income, participation in federal, state, or local assistance programs, or other means-tested eligibility criteria, and must also demonstrate the pre-existing verification process used for this existing program.

10. The Bureau next proposes that the Commission should delegate to them the authority to review and approve or deny service provider applications consistent with the authority it possessed for the EBB Program. The Bureau proposes to require only providers that did not participate in the EBB Program to seek Commission approval prior to submitting to USAC the ACP election notices. The Bureau also proposes that applications should be reviewed on a rolling basis throughout the Affordable Connectivity Program. The Bureau seeks comment on these proposals. What efficiencies should the Commission consider to manage the speedy and thorough review of provider applications? Once the Commission has approved (or denied) an application, how should it inform the applicant of that determination? The Bureau seeks comment generally on using the application and review processes from the EBB Program in the Affordable Connectivity Program, and any modifications the Commission should consider for the implementation of the Affordable Connectivity Program.

11. The Bureau seeks comment on any additional changes that should be made to the provider approval process given the anticipated longer timeframe of the Affordable Connectivity Program. For instance, what requirements for notice and approval should the Commission impose with respect to transactions between participating providers? Historically, transactions that alter the ownership interests of ETCs participating in the High Cost and Lifeline programs must receive approval from the Bureau under its license transfer, Universal Service Fund and compliance plan authorities. Should the Commission impose a similar requirement for ACP providers? Should the Commission instead only require the providers to maintain up-to-date ownership information in its election notice filed with USAC? The Bureau also recognizes that providers are not required to participate in the Affordable Connectivity Program and it anticipates that some providers may wish to voluntarily relinquish their eligibility. Should the Commission adopt a formal process providers must follow to relinquish ACP eligibility? Must the Commission act on such notice before a provider can withdraw from the Affordable Connectivity Program? The Bureau seeks comment on a process through which ACP providers can cease providing service supported by the program while also ensuring that their subscribers are provided adequate notice and given the opportunity to transfer their benefit to another service provider.

12. In the EBB Program, the Commission required all participating providers to file an election notice with USAC to participate. The Commission also established an expedited process where existing ETCs and other approved providers could gain access to the necessary USAC systems being used to administer the EBB Program. The EBB provider election notice includes: (1) The states in which the provider plans to participate in the EBB Program; (2) a statement that, in each such state, the provider was a ''broadband provider'' as of December 1, 2020; (3) a list of states where the provider is an existing ETC, if any; (4) a list of states where the provider received FCC approval, whether automatic or expedited, to participate, if any; (5) whether the provider intends to distribute connected devices under the EBB Program; (6) a description of the internet service offerings for which the provider plans to seek reimbursement from the EBB Program in each state; (7) documentation demonstrating the standard rates for those services; and (8) any other administrative information necessary for USAC to establish participating providers in the EBB Program. Should the Commission require all providers to submit a new election notice for the Affordable Connectivity Program? By doing so, the Commission would not only give providers an opportunity to refresh the information they initially provided for the EBB Program, but would also ensure that providers are committed to participating in this new program and understand the program requirements. Alternatively, the Bureau seeks comment on whether the Commission should require only providers that have not certified any claims for the EBB Program to submit an election notice for the Affordable Connectivity Program. Would this alternative approach be sufficient to ensure that EBB Program providers are committed to participate in the Affordable Connectivity Program and are aware of the new program requirements? If the Commission does not require all EBB Program providers to submit new election notices in order to participate in the Affordable Connectivity Program, should the Commission require those providers to update their election notices to reflect new services and connected devices to be offered in the Affordable Connectivity Program? The Bureau also seeks comment on the EBB Program election notice form and process administered by USAC and what modifications would be appropriate for the Affordable Connectivity Program.

13. The Infrastructure Act removes the Consolidated Appropriations Act requirement that the EBB Program supported service must have been offered ''in the same manner, and on the same terms, as described in any of such provider's offerings for broadband internet access service to such household, as on December 1, 2020.'' Moreover, the Infrastructure Act also imposes a new requirement that providers ''shall allow an eligible household to apply the affordable connectivity benefit to any internet service offering of the participating provider, at the same rates and terms available to households that are not eligible households.'' Given these

changes, the Bureau seeks comment on the information and the supporting documentation that should be collected by USAC as part of the election process to help guard against waste, fraud, and abuse, and to ensure that the provider offers supported service through the Affordable Connectivity Program at the same terms available to households not eligible for the program. For instance, should the Commission require a demonstration that the service offering was generally available for a specific period of time prior to the submission of the election notice or the launch of the Affordable Connectivity Program? If so, what should that period of time be? Would such a requirement be consistent with the Infrastructure Act's requirement that eligible households be allowed to apply the benefit to any internet service offering of the provider? How should promotional and contract rates be evaluated for purposes of determining whether the supported service is offered on the same terms as those offered to non-eligible households? The Bureau also seeks comment on the appropriate geographic area for evaluating whether the service is offered at the same rates and terms as those offered to non-eligible households. Can a provider's rates in one geographic area be used as a reference for comparable rates for the Affordable Connectivity Program in another area? How large of a geographic area should the Commission use as a reference for comparing rates? How should rates in areas where a provider recently expanded service be considered?

14. EBB Program election notices are also required to include information about the connected devices offered by the provider. With respect to the connected devices providers seek to offer through the Affordable Connectivity Program, what information should the Commission require in the election notice? Should providers be required to submit documentation on the retail rate of the device, including, but not limited to, the make, model, and specifications of the device, and the cost of the device to the provider? Currently, in the EBB Program, providers only need to include documentation detailing the equipment, rates, applicable costs of the laptop, desktop or tablet and provide summary information regarding the devices, rates, and costs. The Bureau seeks comment on requiring connected device specifications and the cost of the device in the ACP election notice to help USAC and the Commission determine whether the reimbursement claims for the device are compliant with the Commission's rules and to help guard against waste, fraud, and abuse.

15. The Bureau also proposes that with their election notices providers submit to USAC the lists of ZIP codes where they will offer the supported services to be used to populate the Companies Near Me tool on USAC's website without delay. The Companies Near Me tool allows consumers to find a Lifeline or EBB Program provider in their area. The Bureau seeks comment on this proposal and other information the election notice should collect.

16. As in the EBB Program, the Bureau proposes to accept election notices on a rolling basis throughout the Affordable Connectivity Program. Should the Commission adopt a specific timeframe for acting on provider elections? How should the timeframe take into account the need for USAC simultaneously to administer the EBB Program or the Affordable Connectivity Program, and also process election notices? Once USAC has reviewed an election notice and verified that the broadband provider is eligible to participate in the Affordable Connectivity Program, how should it inform applicants of that determination? The Bureau also seek comments on when and under what circumstances USAC should reject an election notice. Can USAC take into account past complaints, enforcement actions, fraud convictions, or audit findings as bases for rejecting a provider's election for the Affordable Connectivity Program? Further, if an applicant fails to provide with its election notice or application the information that may be required under the Commission's rules, should that be a basis for rejecting or delisting that applicant? Are there other reasons that would justify rejection? Because the Infrastructure Act eliminated the EBB Program requirement that participating providers must have offered a broadband service as of December 1, 2020 in order for that service to qualify for EBB Program support, the Bureau anticipates the Affordable Connectivity Program will be open to a broader range of providers. The Bureau seeks comment on what information should be collected from providers to ensure that they are legitimate broadband providers committed to adhering to the ACP rules and are capable of providing broadband service to eligible households. For example, should the Commission require providers to certify that they would be able to promptly provide service in an area if a subscriber requested it? Should the Commission require providers to certify that they will respond to consumer complaints filed using the dedicated ACP complaint process within 30 days?

17. Participating providers necessarily will have to interact with both the Commission and USAC. The Bureau proposes that, as with the EBB Program election process, a broadband provider will be required to have already registered with the Commission and USAC and to have received both an FCC Registration Number (FRN) and Service Provider Identification Number, if applicable, before filing an election notice. The Bureau proposes to retain for the Affordable Connectivity Program the information requested on the EBB Program election form. This includes a requirement that providers include their data universal numbering service (DUNS) and employer identification numbers (EIN) on the election form. The Bureau seeks comment on this proposal and asks what other financial information from providers it should collect on the election notice to ease the administration of the program. For instance, requiring each participating provider to file a separate election notice rather than allowing affiliated providers the ability to file a joint election notice would ease the processing of payments to each provider in the Affordable Connectivity Program. The Bureau thus proposes requiring each participating provider to file an election notice separately, that would include the FRN, EIN, and DUNS for the entity receiving payment. The Bureau seeks comment on this proposal. The Bureau also seeks comment on any burdens related to the election notice process, particularly for small providers, and possible ways to alleviate these burdens.

18. The Infrastructure Act leaves unchanged the requirement that the Commission ''expedite the ability of all participating providers to access the National Verifier and the National Lifeline Accountability Database (NLAD) for the purposes of determining whether a household is an eligible household.'' The Bureau proposes that all participating providers be required to have their agents and other enrollment representatives registered with the Representative Accountability Database (RAD), as is currently required for the Lifeline and EBB Programs as a way to minimize waste, fraud, and abuse. As it does in the Lifeline program, should the Commission prohibit participating ACP providers from offering or providing to their enrollment representatives or their direct supervisors any commission compensation that is based on the number of consumers who apply for or are enrolled in the ACP with that provider? In the *EBB Program Order,* 86

FR 19532, April 13, 2021, the Commission declined to apply this prohibition to the EBB Program ''to avoid discouraging provider participation and diminishing consumer choice in the [EBB] Program.'' Should the longer-term nature of the Affordable Connectivity Program change the Commission's assessment of whether these concerns outweigh the possible benefits of the prohibition in guarding against waste, fraud, and abuse? What other actions should the Commission consider to protect the Affordable Connectivity Program and enrolling households from waste, fraud and abuse caused by rogue agents of providers?

19. To access the databases, Affordable Connectivity Program providers will be required to accept USAC's OnePortal Terms and Conditions, agreeing that their access is conditioned on their compliance with federal laws regarding privacy, data security, and breach notification. The Bureau proposes that once USAC has verified a broadband provider's election notice, it should expeditiously process and prioritize registrations from such providers and take any other steps needed to facilitate access by participating providers to these databases. For providers with an election notice that is verified for the Affordable Connectivity Program, but not for the EBB Program, should the Commission direct USAC to limit the provider's access to USAC systems before the Affordable Connectivity Program is launched? The Bureau seeks comment on ways to help providers, especially those who are new to USAC systems, gain access to and familiarity with the systems they need to enroll households in the Affordable Connectivity Program.

20. The Bureau proposes that the Commission formalize a process for limiting provider access to USAC systems or removing participating providers from the Affordable Connectivity Program in situations where there are concerns of waste, fraud, and abuse. For example, should USAC remove providers if there is a trend of troubling complaints that suggest that the provider is not offering eligible households broadband service or connected devices, is failing to properly enroll subscribers pursuant to ACP rules, is not passing through the discounts to subscribers, is providing devices that do not provide the connectivity that was promised or that consumers require, or is otherwise acting in a way that suggests failures to comply with the Affordable Connectivity Program rules? Should the Commission promulgate rules providing for spot checks by USAC or the Commission to monitor provider compliance? Should the Commission supplement its document retention rules to facilitate such monitoring? Should the Commission provide for a mechanism to promptly delist or suspend providers or their agents where there is sufficient evidence they have (1) submitted material, false information to USAC or the Commission, (2) failed to submit information required by the approval or election process, or (3) otherwise failed to comply with ACP program rules? The Bureau seeks comment on this proposal and request comments on the tools USAC and the Commission have available or should have available to lock out and/or remove providers from the Affordable Connectivity Program.

21. The Consolidated Appropriations Act allows a participating provider to ''rely upon an alternative verification process of the participating provider,'' to determine household eligibility and enroll households in the EBB program, subject to certain conditions. Pursuant to the process set out by the Consolidated Appropriations Act, the ''participating provider submits information as required by the Commission regarding the alternative verification process prior to seeking reimbursement,'' and the Commission has seven days after receipt of the information to notify the participating provider if its ''alternative verification process will be sufficient to avoid waste, fraud, and abuse.'' This approval allows participating providers to verify all household eligibility criteria through their own eligibility verification process in addition to, or instead of, using the National Verifier. The Infrastructure Act does not modify the requirement that a provider seeking automatic approval must have eligibility ''verification processes that are sufficient to avoid fraud, waste, and abuse.'' However, by eliminating a provider's existing COVID–19 program as a basis for inclusion, the Infrastructure Act does modify the types of acceptable ''existing programs'' that a provider's alternative verification process would incorporate to determine a household's eligibility in the Affordable Connectivity Program. The Bureau seeks comment on the impact of this change on the Commission's consideration of alternative verification process requirements.

22. The Commission required alternative verification processes for the EBB Program to be at least as stringent as methods used by the National Verifier. To meet this standard, EBB participating providers that use alternative verification processes need to collect a prospective subscriber's: (1) Full name, (2) phone number, (3) date of birth, (4) email address, (5) home and mailing addresses, (6) name and date of birth of the benefit qualifying person if different than applicant, (7) basis for inclusion in program (*e.g.,* SNAP, SSI, Medicaid, school lunch, Pell Grant, income, provider's existing program, etc.) and documentation supporting verification of eligibility, and (8) certifications from the household that the information included in the application is true. The provider is required to describe the processes it (or a third-party) uses to verify the required information, and is required to explain why the alternative process would be sufficient to avoid waste, fraud, and abuse. The provider is also required to explain how it trains its employees and agents to prevent ineligible enrollments, including enrollments based on fabricated documents. If the alternative verification process fails to include any of the required information, the provider is required to explain why such information was not necessary to prevent waste, fraud, and abuse. Finally, if a provider without an established low-income or COVID–19 program seeks approval of an alternative verification process, it is required to explain why it proposes to use an alternative verification process instead of the National Verifier eligibility determinations. The Bureau proposes to require the same information for any provider seeking approval for an alternative verification process in the Affordable Connectivity Program, and it seeks comment on this proposal.

23. The Bureau proposes that providers with approved EBB Program alternative verification processes can continue to use those processes when enrolling households in the Affordable Connectivity Program in a manner consistent with the Affordable Connectivity Program's revised eligibility criteria. The Bureau seeks comment on this proposal and any changes that would be necessary to update the alternative verification process application to incorporate these statutory changes for the Affordable Connectivity Program. The Infrastructure Act continues to allow providers to use their alternative verification processes based on the provider's eligibility requirements for its existing low-income program and does not require alternative verification processes to verify all of the statutory household eligibility bases for inclusion in the Affordable Connectivity Program. Additionally, the Infrastructure Act

does not modify the requirement that an alternative verification process must be sufficient to avoid waste, fraud, and abuse, as required by the Consolidated Appropriations Act. Thus, the Bureau proposes that providers with existing approved alternative verification processes may approve households for the Affordable Connectivity Program if the household meets the criteria for the provider's existing low-income program or the statutory eligibility requirements, and these providers need not seek new Commission approval for their alternative verification processes. However, the Bureau also proposes that providers with approved alternative verification processes must seek new Commission approval to verify any eligibility criteria not originally contained in prior approved processes. For example, a provider will need to seek approval from the Commission if it intends to verify in its alternative verification process household participation in the Special Supplemental Nutritional Program for Woman, Infants and Children (WIC) if the provider's approved processes do not specify WIC or if WIC is not a qualifying program for the provider's own low-income program. The Bureau seeks comment on this approach.

24. The household eligibility determinations made by the National Verifier represent a strong waste, fraud, and abuse prevention tool. The importance of the independent household eligibility reviews and verification conducted by the National Verifier was recognized by Congress, and the Commission has also stated that the National Verifier is an effective tool and important protection against waste, fraud, and abuse. During the EBB Program, the periodic updates to the National Verifier to improve the EBB household verification process proved to be an effective and robust tool for providers and households to efficiently determine household eligibility. In fact, many providers with approved alternative verification processes choose to use the National Verifier process in addition to or in lieu of their own alternative processes. In light of the reliance on the National Verifier by many providers with an alternative verification process in the EBB Program and the robust verification tools offered by the National Verifier, the Bureau proposes to approve alternative verification process applications only from providers with existing low-income programs and where the provider's existing low-income program requires the provider to use an alternative verification process and not the National Verifier. Accordingly, providers with existing programs that have an established eligibility approval process that would be incompatible with the National Verifier or other justification that prevents the provider's eligibility process from using the National Verifier would be able to seek an alternative verification process. The Bureau seeks comment on this proposal.

25. During the EBB Program, some providers without an established low-income program sought approval of an alternative verification process even where the providers had already been designated as ETCs, had been providing Lifeline service for years, and had a history of using the National Verifier and other USAC systems to determine eligibility for Lifeline. These providers typically claimed they needed an alternative verification process for efficiency reasons or administrative ease, but their requests for approval did not address the increased risk of waste, fraud, and abuse inherent in not using the National Verifier. Moreover, these alternative verification processes were untested and seemingly created only for the purpose of the EBB Program application. The Bureau is concerned that in such cases, the provider may not have the appropriate financial incentives to make accurate eligibility determinations, because the Emergency Broadband Connectivity Fund, and not the provider itself, is subsidizing the discounted service. In contrast, a provider who is enrolling households in its own low-income program has an adequate financial incentive to make accurate eligibility determinations because the process was developed to support an existing program through which the provider had committed to subsidize the discounted service offered to eligible households.

26. Accurately determining household eligibility is the principal consideration for the National Verifier and its independent reviews. The accuracy of the eligibility decision is the principal tool in preventing improper payments and other waste, fraud, and abuse in the EBB Program and will continue to be in the successor Affordable Connectivity Program. A proposal to use an alternative verification process that does not offer an explanation for why the alternative process is necessary when the provider could easily use the National Verifier fails to make the statutorily required showing that the process will be ''sufficient to avoid waste, fraud, and abuse.'' Further, the National Verifier maintains a number of database connections that produce automatic eligibility approvals that individual providers would have to conduct through a manual application review process. All of these considerations weigh in favor of limiting the use of alternative verification processes to providers that maintain an existing verification process used for its own low-income program or other purpose unrelated to the EBB Program, Affordable Connectivity Program, or similar federal assistance program. The Bureau seeks comment on its proposal and the Commission's authority to limit approvals of an alternative verification process to such providers.

27. The Affordable Connectivity Program will provide eligible households a discount on broadband internet access service and a connected device. Consistent with the EBB Program requirements, the Bureau interprets the Infrastructure Act to limit the ACP benefit to one-per-household for both the monthly benefit and the one-time connected device reimbursement. In administering the EBB Program, the Commission used the definition of ''household'' under the Lifeline rules and did not limit the number of participating households that could be located at a particular address. The Bureau proposes to apply this same definition and approach to the Affordable Connectivity Program. Consistent with the approach in the EBB Program, the Bureau also proposes (1) to make available a Household Worksheet (with necessary modifications specific to the Affordable Connectivity Program) to help a household determine whether it is an independent economic household from other existing ACP subscribers at the same address, and (2) to require ACP providers using their own approved alternative verification processes to include measures to confirm that a household is not receiving more than one ACP benefit. The Bureau seeks comment on these proposals. Are any changes to the administration of the one-per-household requirement warranted for the Affordable Connectivity Program? For purposes of individual and household duplicate checks, should the Commission make clear that service providers are also required to check their internal records?

28. The Bureau next seeks comment on implementing the eligibility criteria for the Affordable Connectivity Program. A household may qualify for the Affordable Connectivity Program if at least one member of the household: (1) Meets the qualifications for participation in the Lifeline program (with the modification that the qualifying household income threshold is at or below 200 percent of the Federal

Poverty Guidelines for a household of that size); (2) has been approved to receive school lunch benefits under the free and reduced price lunch program under the Richard B. Russell National School Lunch Act, or the school breakfast program under section 4 of the Child Nutrition Act of 1966; (3) has received a Federal Pell Grant under section 401 of the Higher Education Act of 1965 in the current award year; (4) meets the eligibility criteria for a participating provider's existing low-income program, subject to approval by the Commission and any other requirements deemed by the Commission to be necessary in the public interest; or (5) receives assistance through the WIC Program, established by section 17 of the Child Nutrition Act of 1996 (42 U.S.C. 1786). In addition to adding WIC as a qualifying program for ACP, Congress in the Infrastructure Act raised the maximum income for qualifying based on household income for purposes of the ACP from ''135 percent'' to ''200 percent'' of the Federal Poverty Guidelines for a household of that size, and eliminated as qualifying criteria substantial loss of income since February 29, 2020 and participation in a provider's COVID–19 Program. Commission rules governing the Affordable Connectivity Program will need to reflect these eligibility changes, and the National Verifier will require modifications to implement them.

29. The Bureau seeks comment on the qualifying benefit programs for the Affordable Connectivity Program. In the *EBB Program Order,* the Commission determined that households with students enrolled in schools or school districts participating in the Community Eligibility Provision (CEP) are eligible for the EBB Program regardless of whether anyone in the household applied for school lunch or breakfast assistance individually. The Bureau seeks comment on whether the Commission should take the same approach for the Affordable Connectivity Program. Should the Commission revisit in the Affordable Connectivity Program its decision to allow EBB Program eligibility based only on attendance at a CEP school if the household would not otherwise qualify for the school lunch and breakfast program? Given that the Affordable Connectivity Program is not an emergency, temporary program like the EBB Program, and will have a longer duration than the EBB Program, is there still a compelling reason to allow CEP student eligibility? In a long-term program, how does the Commission assess the risk of allowing households that are not otherwise eligible for the school lunch and breakfast program to receive the ACP benefit? Are there alternatives that the Commission should consider to ensure that households seeking to qualify based on participation in the CEP would otherwise qualify for the school lunch and breakfast program?

30. The Bureau also seeks comment on whether and how the free and reduced price school lunch and breakfast program eligibility criteria apply where schools elect administrative provisions under the National School Lunch Act that have similar elements as the CEP. For example, many students receive meals from schools that elect to participate in alternative United States Department of Agriculture (USDA) mechanisms without annual eligibility determinations that, like the CEP, may result in students receiving free school breakfast or lunch even though the student did not individually apply for assistance. Would expanding the eligibility of the Affordable Connectivity Program to include students attending Provision 2 and Provision 3 schools broaden participation in the Affordable Connectivity Program to low-income households the Infrastructure Act intends to benefit? Given that the Affordable Connectivity Program is not an emergency program, is the risk of allowing households to qualify under these provisions, even if the household would not otherwise qualify for the school breakfast and lunch program, justified? Should the Commission only permit households to enroll in the Affordable Connectivity Program based on these provisions if the household would individually qualify for the school lunch and breakfast program, even if the household is not required to submit an annual application? While Provisions 2 and 3 require schools to provide school meals at no charge to all participating students, schools with high rates of poverty are most likely to use these provisions. With respect to the possible inclusion of Provisions 2 and 3, do the existing information collection and documentation requirements for the school lunch and breakfast program already cover the types of documentation that would be sufficient for the Affordable Connectivity Program to demonstrate participation in Provision 2 or 3, or should the Commission revise its documentation requirements to accommodate their inclusion? Are there databases that identify which schools use Provisions 2 or 3? Is there a potential for waste, fraud, and abuse associated with any documentation for Provisions 2 or 3 that the Commission should not rely on for purposes of demonstrating eligibility for the Affordable Connectivity Program?

31. For households seeking to qualify for the Affordable Connectivity Program based on a current student's participation in a school lunch or breakfast program, the Bureau proposes allowing households to qualify based on documentation from the current school year in which they submit their ACP application *or* the school year immediately preceding their ACP application submissions. This approach would ensure that households are not precluded from participation in the Affordable Connectivity Program due to school closures or school participation in non-annual eligibility determination processes. The Bureau seeks comment on this idea.

32. Pursuant to the statute, a household with a student who receives free or reduced-price school lunch or breakfast can qualify for the Affordable Connectivity Program through the National Verifier, a service provider's alternative verification process, or school-based eligibility verification. Households that seek to enroll in the EBB Program via the National Verifier based on participation in a school lunch or breakfast program at a non-CEP school are required to provide specific information and documentation at the time of enrollment, including the name of the consumer or benefit qualified person, qualifying program, the name of the school or school district that issued the documentation, issue date of the documentation (subject to the applicable time limitations) that aligns with the benefit period, and a letter from the school or school district confirming that a member of the household is approved to participate in the school or lunch or breakfast program during the allowed time period. Service providers using an approved alternative verification process are subject to strict subscriber information collection and document retention requirements. The Bureau proposes that the Commission extend these same requirements to the Affordable Connectivity Program, with modifications to the acceptable documentation dates to reflect the expected longer duration of the Affordable Connectivity Program. The Bureau seeks comment on this proposal. For National Verifier enrollments, if the benefit qualifying person attends a school that participates in the CEP, the household selects the school during the application process. Are there any modifications that the Bureau should consider to guard against potential, waste, fraud and abuse where households seek to enroll through the

National Verifier based on participation in the CEP? For example, should the household be required to provide documentation that the benefit qualifying person attends the school that participates in the CEP?

33. For the EBB Program, where a service provider relies on a school to verify student eligibility for the school lunch or breakfast program, the service provider must certify that it relied on school-provided information and must retain documentation of (1) the school providing the information, (2) the program that the school participates in, (3) the household that qualifies (and qualifying student) and (4) the program the household participates in. Where school-based eligibility verification is used, does the information that providers are required to provide to the NLAD and related document retention requirements sufficiently guard against waste, fraud and abuse? If not, what additional information should be transmitted to the NLAD or what additional documentation should the Commission require service providers to retain where school-based eligibility verifications are used? Is there any additional information that the Commission should require service providers or households to provide at the time of enrollment where a household seeks to enroll based on participation in the school lunch or breakfast program? Should the Commission require service providers to retain any additional documentation of a specific household's ACP eligibility through participation in a school lunch or breakfast program? Should the Commission make any other changes to the required documentation for any other qualifying programs where household eligibility is verified through manual reviews in the National Verifier?

34. The Infrastructure Act permits participating providers to use the same three methods of verifying household eligibility for the Affordable Connectivity Program that are currently used for the EBB Program: (1) Use of the National Verifier and the NLAD; (2) reliance on the participating provider's alternative verification process, subject to certain conditions; and (3) reliance on a school to verify eligibility under the free and reduced price school lunch or school breakfast program. For the Affordable Connectivity Program, the Bureau proposes using the same processes used in the EBB Program for tracking the eligibility of households and verifying household eligibility, with necessary modifications to conform to the ACP requirements, including changed eligibility criteria. To guard against duplicative support, the Bureau proposes requiring all participating providers to track enrollments of eligible households in the Affordable Connectivity Program in the NLAD, including households whose eligibility is verified through a permitted alternative verification process or school-based verification, and to update subscriber information in the NLAD within 10 business days of receiving the changed information. The Bureau seeks comment on this proposal.

35. The Commission's EBB Program rules prohibit participating providers from enrolling or claiming support for any prospective subscriber if USAC cannot verify the subscriber's status as alive, unless the subscriber produces documentation to the National Verifier to demonstrate his or her identity and status as alive. The Bureau proposes to apply the same requirements to the Affordable Connectivity Program, and it seeks comment on that proposal. To promote program integrity, the Bureau also proposes directing USAC to ensure through its program integrity reviews that households whose eligibility is verified through an alternative verification process or other non-National Verifier process comply with this requirement.

36. If a household's eligibility cannot be verified through the National Verifier's automated databases, the Bureau proposes applying the same documentation requirements used for the EBB Program to the qualifying programs for the Affordable Connectivity Program, to the extent consistent with its proposals in this Public Notice. As noted in this document, the Infrastructure Act added WIC as a qualifying program for the ACP. If WIC participation cannot be validated through an automated database connection at launch of the Affordable Connectivity Program, what documentation should the Commission require as the Bureau works to establish an automated connection capable of qualifying WIC participants? For example, do WIC participants receive benefit award letters, approval letters, statements of benefits, or benefit verification letters? Is there any documentation the Bureau should not permit to verify WIC participation for program integrity reasons? How should the Bureau consider WIC Electronic Benefit Transfer (EBT) cards? Do these cards contain sufficient identifying information that would prevent someone who is not enrolled in WIC from using the card to support their enrollment in the Affordable Connectivity Program? In contrast to the other benefit qualifying programs, WIC is designed to provide benefits over a shorter time period, and eligibility is based on income and specific eligibility categories for women, infants and children. For WIC, the benefit period typically lasts six months to one year, after which time the participant must renew their eligibility to continue receiving WIC benefits. What, if any, impact should this have on administering WIC as a qualifying program for the Affordable Connectivity Program? Is the annual recertification requirement that the Bureau proposes below sufficient for households that qualify for the Affordable Connectivity Program based on participation in WIC, given the shorter-term benefit period in the program? Are there any other considerations in administering WIC as a qualifying program?

37. *Enrollment.* Consistent with Lifeline and the EBB Program, the Bureau proposes that the Commission require, for the Affordable Connectivity Program, the program-wide use of NLAD as a tool for enrollment, as well as reimbursement calculations and duplicate checks in all states, territories, and the District of Columbia, regardless of a state's NLAD opt-out status in the Lifeline program. The Bureau seeks comment on this approach. The Bureau proposes that providers be required to transmit to NLAD information about the subscriber, service, connected device, the reliance on an AVP or school eligibility determination to verify a subscriber's eligibility, and whether the household lives on Tribal lands or high cost areas that are eligible for the enhanced support of up to $75 a month for ACP-supported service. The Bureau seeks comment on this proposal and the other information that should be submitted to NLAD to assist in the administration of the Affordable Connectivity Program and to provide USAC and the Commission with information to support the providers' claims for reimbursement.

38. Consistent with the EBB Program the Bureau proposes requiring prospective ACP subscribers who are not already enrolled in Lifeline to submit an application in order to enroll in the Affordable Connectivity Program. Households enrolled in the Lifeline program are automatically eligible for the Affordable Connectivity Program based on their Lifeline eligibility, and as with the EBB Program, the Bureau proposes not to require these households to submit new applications or new eligibility documentation to participate in the Affordable Connectivity Program, provided that the household opts in or affirmatively requests enrollment in the Affordable Connectivity Program and is already

enrolled in NLAD. That said, the Bureau proposes that existing Lifeline subscribers in the NLAD opt-out states of California, Oregon, and Texas should have the option to submit an application to the National Verifier for the Affordable Connectivity Program if they choose. Because state administrators or agencies in those states continue to verify household eligibility for Lifeline consumers, USAC generally does not have real-time data regarding subscriber Lifeline eligibility for purposes of automatic enrollment in the EBB Program like it does for Lifeline consumers whose eligibility is confirmed by the National Verifier. These three NLAD opt-out states have worked closely with USAC since the start of the EBB Program to streamline the EBB enrollment process for subscribers by increasing the frequency of eligibility listings to USAC on a weekly basis. As a result, service providers in the NLAD opt-out states are able to enroll existing Lifeline subscribers whose eligibility was verified by the state based on the most recent weekly update, rather than having to wait until the state's next monthly file is submitted to USAC. USAC and the Bureau will continue to work with the states to ensure that these weekly updates will continue for purposes of enrolling in the Affordable Connectivity Program existing Lifeline subscribers in California, Oregon, and Texas, although the National Verifier application will also be available as a way for Lifeline consumers in these states to verify their ACP eligibility. The Bureau seeks comment on whether USAC should make additional changes to this process to administer the Affordable Connectivity Program. Are there any other challenges with relying on NLAD data from opt-out states, and if so, how can those challenges be overcome to facilitate the administration of and enrollment in the Affordable Connectivity Program?

39. As is permitted for the EBB Program, the Bureau proposes allowing households seeking to enroll in the Affordable Connectivity Program to verify their identity through the last four digits of their Social Security number or other approved identity documentation. The Bureau seeks feedback on the practice of allowing eligible consumers to verify their identity by submitting documentation rather than providing the last four digits of their Social Security number. Did this more flexible approach encourage participation by households that otherwise would not have completed an application for the EBB Program? If the Commission adopts this approach for the Affordable Connectivity Program, how can USAC improve the experience for applicants? Are there other sources, systems or databases the Bureau could rely upon to more quickly qualify households providing alternative documentation?

40. Where participating providers rely on the National Verifier to enroll households in the Affordable Connectivity Program, the Bureau proposes requiring eligible households to interact directly with the National Verifier to apply for the Affordable Connectivity Program, as is currently required for the EBB Program and the Lifeline program. Consistent with the Lifeline program and the EBB Program, the Bureau proposes to provide access to an online portal and application form to apply for the Affordable Connectivity Program, and make available an eligibility check application programming interface (API) that allows providers to help consumers with the ACP application. The Bureau also proposes using the National Verifier automated database connections wherever possible to verify household eligibility for the Affordable Connectivity Program, and extending to the Affordable Connectivity Program the existing manual documentation review process used for the EBB Program (with necessary modifications to reflect the ACP eligibility criteria) where eligibility cannot be verified through a National Verifier automated database. The Bureau seeks comment on these proposals.

41. The Infrastructure Act made several changes to the eligibility criteria for the Affordable Connectivity Program. As a result of these changes, the systems at USAC will require significant development to, among other capabilities, create a new application portal in the National Verifier and make changes in the NLAD to permit and track enrollments under these new qualifying programs. The Bureau seeks comment on ways to expedite the development and testing of the new application, and on any other suggestions for readying the relevant systems to accept enrollments starting on December 31, 2021, as permitted by the Infrastructure Act, for households that qualify for the Affordable Connectivity Program based on the changed eligibility criteria.

42. *De-enrollments.* To guard against waste, fraud and abuse, the Bureau proposes to extend the de-enrollment requirements applicable to both the Lifeline and EBB Programs to the Affordable Connectivity Program, with any necessary modifications to conform to the eligibility criteria for the Affordable Connectivity Program. The Bureau similarly proposes to require participating providers to transmit the de-enrollment information to the NLAD within one business day of de-enrollment. Based on the Bureau's experience with the EBB Program, it believes it would be beneficial for USAC to continue to process de-enrollment requests directly from subscribers and notify the subscriber's provider when those de-enrollments occur. The Bureau seeks comment on these proposals. To the extent technically feasible, should there be a consumer self-service option to terminate Affordable Connectivity Program service? Could service providers give consumers a self-service option to terminate Affordable Connectivity Program service through their systems?

43. As with the Lifeline and EBB Programs, the Bureau also proposes to apply a usage requirement to the Affordable Connectivity Program. Where a household receives a service for which a fee is not assessed or collected, limiting reimbursement to households who are actually using a supported service is an important safeguard against waste, fraud, and abuse. The Bureau proposes applying the same usage definition for the Lifeline and EBB Programs to the Affordable Connectivity Program, and similarly propose to prohibit participating providers from claiming Affordable Connectivity Program reimbursement for households that are not actually using a service for which a fee is not assessed or collected. Is the existing definition of usage adequate and does it include sufficient methods by which subscribers receiving fixed broadband service could demonstrate usage? Should the test be modified to ensure a subscriber is actually using a supported service rather than simply keeping a device powered?

44. The Bureau seeks comment on whether the proposed definition of usage could result in service providers receiving payment where the subscriber is not actually using their ACP service. In the *2019 Lifeline Notice of Proposed Rulemaking,* 84 FR 71338, December 27, 2019, the Commission asked whether it may be possible for a provider to install an application ''app'' on an end-users device that would ''use'' data without the end-user's knowledge. This, and any other data usage that is not generated by the consumer would make it difficult to differentiate legitimate subscriber usage from data usage that happens without the knowledge or direction of the subscriber. The Lifeline usage rules require that the activities that demonstrate usage must be ''undertaken

by the subscriber.'' Would making clear that usage of data means usage of data initiated by the ACP subscriber rather than fabricated by an app or some other means sufficiently address this issue? Are there other steps that the Commission should take to ensure that where ACP service is subject to the usage requirement, service providers are only being reimbursed where the end user is actually using the service? What records should service providers be required to maintain to sufficiently demonstrate actual subscriber usage of their ACP service during an audit or investigation?

45. Alternatively, for purposes of the Affordable Connectivity Program should the usage documentation standards that have historically been used in Lifeline, with the need to rely on records supporting subscribers' calling, texting and billing activity, as well as data usage, be discontinued in favor of a different model for the Affordable Connectivity Program? For instance, should the Commission mandate a third-party app on subscriber devices that confirms the subscriber is accessing its ACP-supported service so that records substantiating subscriber usage no longer need to be reviewed? Or could subscribers simply be required to contact USAC periodically, to confirm they want to continue with the service? Would these proposals raise any privacy concerns? Are there other alternatives the Commission should consider to ensure that payments are only issued for ACP service the subscriber is actually using where required by program rules?

46. Consistent with the Lifeline program, for purposes of the Affordable Connectivity Program, for households that subscribe to an ACP service that is subject to a usage requirement, the Bureau proposes a 30-day non-usage period, and a 15-day period for households to cure their non-usage. As with the Lifeline program, households that subscribe to an ACP service that is subject to a usage requirement and have not used their ACP-supported service in 30 days cannot be claimed for reimbursement after the initial 30-day non-usage period unless and until they have cured their non-usage. In order to cure non-usage, an ACP subscriber would need to demonstrate usage as defined in the Lifeline rules, and the Bureau proposes to extend the Lifeline usage rules to the Affordable Connectivity Program, with any modifications the Commission may adopt for the Affordable Connectivity Program. The Bureau seeks comment on these proposals. Given that the Affordable Connectivity Program is not an emergency program and will have a longer duration than the EBB Program, the Bureau further proposes requiring the de-enrollment of households who do not cure their non-usage in the permitted cure period, as is currently required in the Lifeline program. Are any modifications warranted to administer non-usage and de-enrollment for non-usage requirements for the Affordable Connectivity Program?

47. *Recertification.* The Bureau next seeks comment on implementing a subscriber recertification requirement for the Affordable Connectivity Program to ensure enrolled subscribers continue to meet the ACP eligibility criteria from year to year. Annual recertifications are an important program safeguard for the Lifeline program to ensure the continued eligibility of enrolled subscribers. Accordingly, because the Affordable Connectivity Program is expected to extend multiple years, the Bureau proposes requiring households enrolled in the Affordable Connectivity Program to recertify their eligibility for the Affordable Connectivity Program at least annually (*e.g.,* once a calendar year), starting with the calendar year following their enrollment in the Affordable Connectivity Program. For purposes of this requirement, should the Commission adopt the existing Lifeline rules and processes governing recertification and de-enrollment of households who do not pass recertification or fail to timely recertify? For EBB enrolled subscribers that transition to the Affordable Connectivity Program, what should be considered their enrollment date for the purposes of any ACP recertification requirement?

48. For households whose eligibility for the Affordable Connectivity Program is verified through the National Verifier, the Bureau proposes to model recertification after the Lifeline program, where USAC is responsible for recertification for households who enrolled through the National Verifier. To recertify these households, USAC uses the automated databases in the National Verifier for recertification, and provides a paper recertification form, and online and Interactive Voice Response recertification option for households whose eligibility cannot be verified through the National Verifier's automated database connections. To promote administrative efficiency and minimize the administrative burden on providers and consumers, to the extent that it is technically feasible to track recertification of a particular subscriber across the Lifeline program and Affordable Connectivity Program, should the Commission allow households enrolled in both programs to rely on their Lifeline program recertification, including Lifeline program recertifications conducted by state agencies or state administrators for the opt-out states, to satisfy any recertification requirements the Bureau adopts for the Affordable Connectivity Program? Given the difference in eligibility criteria between the Affordable Connectivity and Lifeline programs, what bearing, if any, should a consumer's unsuccessful recertification for the Lifeline program have on the household's participation in the Affordable Connectivity Program? Should additional consumer outreach or notification be required for ACP households that did not pass or did not timely respond to a Lifeline recertification attempt? Should an unsuccessful recertification for the Lifeline program automatically trigger a need to verify continued eligibility for the Affordable Connectivity Program if the subscriber relied on their enrollment in a Lifeline-qualifying program to qualify for the Affordable Connectivity Program? Is there anything else the Bureau should consider concerning the interplay between Lifeline recertifications and any recertification requirement the Commission may adopt for the Affordable Connectivity Program?

49. How should the recertification process work for households enrolled in the Affordable Connectivity Program whose initial eligibility was verified through a process other than the National Verifier? Should the Commission require USAC to perform the recertifications for these households, or should ACP participating providers be required to perform recertifications? To the extent it is technically and administratively feasible, would requiring USAC to recertify all ACP subscribers best promote program integrity and administrative efficiency? If ACP participating providers perform the recertifications for households enrolled in the Affordable Connectivity Program through a process other than the National Verifier, should the Commission require those providers to submit their recertification plan to the Bureau for prior approval? If so, how should that approval process work? If ACP participating providers conduct recertifications, should the Commission require them to follow the customer notification timelines and processes that USAC currently uses for Lifeline recertifications? Where USAC conducts recertifications for the Lifeline program, for example, the annual recertification is due by the subscriber's anniversary date, rather than using a single uniform recertification deadline for all

subscribers. The Bureau expects that, for the Affordable Connectivity Program, USAC and any service providers conducting recertifications would take a similar approach. How should households be timely de-enrolled from the Affordable Connectivity Program upon a failed recertification effort? Is there anything else the Commission should consider in establishing a recertification requirement for households enrolled in the Affordable Connectivity Program?

50. Just as in the EBB Program, the Affordable Connectivity Program will permit eligible households to receive a discount off the cost of broadband service and certain connected devices, and participating providers to receive a reimbursement for providing such discounts. Similar to the EBB Program, the Infrastructure Act defines ''internet service offering'' as broadband internet access service provided to a household by a broadband provider. Broadband internet access service retains the definition provided in § 8.1(b) of the Commission's rules.

51. The Infrastructure Act also adds a new requirement that a participating provider ''shall allow an eligible household to apply the affordable connectivity benefit to any internet service offering of the participating provider, at the same terms available to households that are not eligible households.'' The Bureau seeks comment on whether ''any internet offering'' should include legacy or grandfathered plans or whether it only includes current offerings of a provider to new customers. The Bureau also seeks comment on how providers will make all of their offerings available for the Affordable Connectivity Program. In particular, the Bureau seeks comment on how providers expect to manage available offerings to ensure compliance with these statutory requirements. It may be that providers offer different plans in different geographies. The Bureau seeks comment on the extent to which geography affects plan availability, and whether some households will be more limited in their ability to apply the affordable connectivity benefit than others? How much time will providers need to assess their available offerings, and does an expedited timeline for launch of the ACP impact a provider's ability to go from hand-picking qualifying service offerings for inclusion in the EBB Program to the comprehensive approach described in the Act?

52. The Bureau next seeks comment on whether the Commission should provide clarity on the internet service offerings that are eligible for reimbursement in the Affordable Connectivity Program. In the *EBB Program Order,* the Commission declined to apply minimum service standards to the internet service offerings eligible for EBB discounts. Should the Commission reconsider this approach for the Affordable Connectivity Program? Does the Commission have the authority under the Infrastructure Act to institute minimum service standards for the Affordable Connectivity Program? The Affordable Connectivity Program will feature a lower standard support amount of $30. Would setting minimum service requirements help to ensure that households are receiving a competitive broadband service that is covered by the support amount? Should the Commission consider other approaches to ensure that households are receiving a competitive service offering? Are such standards necessary given the additional consumer protections in the Infrastructure Act and the requirement that providers make all of their service offerings available for the Affordable Connectivity Program? If the Commission were to adopt minimum service standards, what should the minimum standards be? Should the Commission adopt the minimum service standards in place for the Lifeline program or different standards? How should the Affordable Connectivity Program standards evolve over time? Given the functional differences between how a household uses a mobile and fixed internet connection, the Bureau seeks comment on whether different service standards should be considered for mobile versus fixed internet service, and if so, what to base those standards on.

53. While the Infrastructure Act removes the EBB Program requirement that a qualifying internet service offering be ''offered in the same manner and on the same terms, as described in any of such provider's offerings for broadband internet access service to such household as of December 1, 2020,'' it does allow a household to apply the ACP benefit to any internet service offering ''at the same terms available to households that are not eligible households.'' The Bureau seeks comment on the contours and administrability of this requirement. The Bureau seeks comment on whether this requirement ensures that eligible households receive competitive broadband service offerings, and what additional safeguards and requirements, if any, the Commission could adopt. For example, the Commission viewed the December 1, 2020 requirement for acceptable service offerings in the EBB Program ''as a method of avoiding arbitrage opportunities and waste in the [EBB Program] by allowing unscrupulous providers to take advantage of the increased subsidy available.'' Does the Commission have the authority under the Infrastructure Act to impose any limitations on the services offered? The Bureau seeks comment on rules that would enhance the opportunity that low-income households participating in the Affordable Connectivity Program would receive a competitive internet service offering that meets the needs of the household. While households should be able to apply the ACP benefit to an internet service offering of their choosing, should the Commission prevent providers from introducing into the marketplace internet service offerings that seek only to maximize the ACP benefit reimbursement while not actually providing households with a market-rate internet service? Should the Commission be concerned that providers will have an incentive to raise the price of a $15 plan to a $30 dollar plan solely to maximize the reimbursement amount? Are there additional measures the Commission can take to reduce price gouging and other harms? Alternatively, will providers respond to the requirement that Affordable Connectivity Program and non-ACP subscribers have access to the same service offerings by restricting offerings of certain plans for all of their customers? How can the Commission reduce the incentive for providers to enact pricing or offering strategies that may harm non-eligible households?

54. Under the EBB Program, providers are required to make available ''at least one EBB Program-reimbursed service to each of its eligible households within its service area.'' The Bureau seeks comment on whether the Commission should adopt this policy for the Affordable Connectivity Program. Is this requirement still necessary given that an ACP household may apply the benefit to any broadband service offered by the provider? The Bureau also seeks comment on providers' ability to quickly implement the Infrastructure Act's requirement that a household may apply the benefit to any internet service offering of the participating provider, at the same terms available to households not participating in the Affordable Connectivity Program. What provider billing and system changes are necessary in order to provide discounted broadband service to ACP households? The Bureau suspects that the requirement to make the benefit

available to all broadband services will have a significant impact on providers and it seeks comment on whether providers would be prepared to participate in the Affordable Connectivity Program by the Infrastructure Act's contemplated effective date of December 31, 2021. The Bureau also seeks comment on whether the statutory deadline for implementing this change could deter providers from electing to participate in the program or cause them to delay their election until their systems were prepared to support the application of the benefit across all available broadband services.

55. *Multiple Dwelling Units.* The Bureau also seeks comment on whether the Commission should adopt measures to make it easier for residents in multiple dwelling units with bulk broadband providers to participate in the Affordable Connectivity Program. In the *EBB Program Order,* the Commission determined that eligible households that ''live at a single address, such as senior and student living, mobile home parks, apartment buildings, and federal units, that receive service as part of a bulk billing arrangement where the households 'are not directly billed for services by their internet service provider, but instead pay a monthly fee for broadband services to their landlord''' should be permitted to participate in the EBB Program. The Commission agreed with commenters and made the EBB Program available to such households, ''as long as the provider is approved in the Program and the household is eligible under the statute,'' and set out additional guidelines for such situations. Should the Commission adopt this flexibility in the Affordable Connectivity Program? What else should the Commission consider about such arrangements?

56. *Bundled Service Offerings.* In the *EBB Program Order,* the Commission found that bundled service offerings such as those offering voice, data, and texting could be eligible for the EBB Program if such bundled offerings were offered in the same manner and on the same terms on or before December 1, 2020. However, the Commission declined to allow the Emergency Broadband Benefit to be applied to the full price of broadband-bundled video service, finding that it was not contemplated in the statute and not necessary to ensure that consumers in the EBB Program have a robust choice in broadband service offerings. The Bureau proposes that, as in the EBB Program, voice, data, and text bundled services should be eligible for ACP support, while broadband-video bundled services should not. The Bureau seeks comment on this proposal.

57. *Associated Equipment.* The Infrastructure Act modifies the definition of the benefit to be applied to broadband service. Specifically, the affordable connectivity benefit ''means a monthly discount for an eligible household applied to the actual amount charged to such household, in an amount equal to such amount charged, but not more than $30, or if an internet service offering is provided to an eligible household on Tribal land, not more than $75.'' The Infrastructure Act removed a reference to ''associated equipment'' that was included in the definition of ''emergency broadband benefit'' previously. The prior inclusion of ''associated equipment'' allowed the Commission to include ''equipment necessary for the transmission functions of internet service offerings supported through the EBB Program,'' which the Commission found includes equipment such as modems, routers, and hotspot devices and antennas. In light of this modification of the definition, the Bureau seeks comment on whether monthly rental costs for equipment such as modems, routers, hot spot devices, antennas, and any other equipment that is necessary for the transmission functions of internet service offerings should be eligible for the affordable connectivity benefit. To the extent the Commission makes the monthly rental costs for such equipment eligible in the Affordable Connectivity Program, the Bureau seeks comment on whether the Commission should continue to disallow reimbursement for upfront costs for such equipment that a provider may charge a consumer when they begin receiving broadband service.

58. *Connected Devices.* The Infrastructure Act retains the definition of connected device and the reimbursement rate for such devices used in the EBB Program. For the Affordable Connectivity Program, participating providers, in addition to providing an ACP-supported broadband service to the household, may be reimbursed up to $100 for a connected device delivered to the household, provided that the ''charge to such eligible household is more than $10 but less than $50 for such connected device.'' A connected device is defined in the statute as a laptop, desktop computer, or a tablet.

59. In the *EBB Program Order,* because the Consolidated Appropriations Act declined to include cellular phones or smartphones in the definition of connected devices, the Commission found that a connected device could not include ''devices that can independently make cellular calls such as large phones or phablets.'' The Bureau proposes that the Commission adopt the same approach in the Affordable Connectivity Program, and it seeks comment on that proposal. One EBB Program provider has suggested the EBB Program could support some tablets with cellular capabilities. Should the Commission provide additional guidance or flexibility with respect to the characteristics or features that would make a laptop, desktop, or tablet eligible under the program?

60. The Infrastructure Act also does not alter the requirement that a provider may not receive reimbursement for more than one connected device per household. In the *EBB Program Order,* the Commission found that there was no legal basis to allow households to receive more than one connected device through the EBB Program. The Bureau proposes to adopt the same approach for the Affordable Connectivity Program. The Bureau also seeks comment on interpreting the one-time connected device reimbursement restriction to prevent providers from claiming a device reimbursement in the Affordable Connectivity Program for a household that received a reimbursable connected device in the EBB Program. Should the Commission prohibit households that received a connected device through the EBB Program from receiving a second device in the Affordable Connectivity Program (and therefore prohibiting providers from claiming a connected device discount reimbursement for a household enrolled in the Affordable Connectivity Program if that household received a connected device through the EBB Program)? The *EBB Program Order* also clarifies that participating providers must actually charge the household a co-payment at least $10 but no more $50 before they can receive reimbursement of up to $100 for a connected device. The Bureau also proposes that providers be required to retain documentation proving that the eligible household made a compliant financial contribution towards the cost of the connected device, as well as the amount thereof, before the provider seeks reimbursement. The Bureau seeks comment on this proposal. In the *EBB Program Order,* the Commission declined to require USAC to collect and review documentation supporting the connected device claim. Documentation requirements serve important protections against program waste, so the Bureau seeks comment on whether the Commission should require a provider to submit documentation supporting a connected device claim in

the Affordable Connectivity Program. Should the Commission require a review of a provider's supporting documentation before processing the reimbursement claim for a connected device?

61. The *EBB Program Order* and rules require that providers seeking reimbursement for the connected device discount certify, under penalty of perjury, that the reimbursement claim for the connected device reflects the market value of the device. In determining whether the amount claimed for the connected device reflects no more than the market value of the device, should the Commission take into account the amount of the co-pay collected from the household? If the Commission were to maintain for the Affordable Connectivity Program the ''market value'' standard used for the EBB Program, how should the market value be determined, particularly where a device offered by a provider through the program is not available in the retail market? What information should the providers be required to retain and provide to demonstrate that they claimed an appropriate amount for the device?

62. The Bureau also seeks comment on requiring that the reimbursement amount for a connected device reflects the cost of the connected device to the provider. For example, there are many tablets sold for less than $100, and providers may be able to purchase them at wholesale cost or receive volume discounts. Under the rules of the EBB Program, in those circumstances, providers would be able to seek reimbursement for the higher market value of the device, rather than the cost to the provider for obtaining and delivering the device to the household, and make a profit from the EBB Program. Should the Affordable Connectivity Program permit providers to profit off the benefit by receiving more funding in reimbursement than the provider's cost to procure and supply the device? Would using a cost-based standard allow USAC and the Commission to determine if the provider is claiming the appropriate amount, particularly where the provider's device is not widely available or not sold in retail stores? The Bureau seeks comment on how the Commission can ensure that providers are not claiming amounts beyond what it cost them to provide the device. The Bureau also seeks comment on whether limiting providers to claiming a reimbursement amount that reflects the cost to them of acquiring and providing the device to the household would discourage providers from offering connected devices eligible for reimbursement from the Affordable Connectivity Fund? If the Commission were to adopt a cost-based approach, what sort of incentive would providers need (*e.g.,* cost-plus) in order to find offering a device worthwhile? How can the Commission be sure that any such incentive is reasonable and does not lead to offers of inferior devices and/or overcharge to the Affordable Connectivity Fund or consumers?

63. In the *EBB Program Order,* the Commission adopted a rule prohibiting providers from seeking connected device reimbursement for a household if that household is not receiving the EBB for service provided by the same participating provider, and the Commission required claims for connected devices must be made ''concurrent with or after the provider's first reimbursement claim for service for that household.'' In response to feedback from providers, the Bureau subsequently released an order waiving this rule, explaining that granting the waiver removes a disincentive that could discourage providers from offering connected devices if there is uncertainty about a provider's ability to seek reimbursement for a connected device delivered to a household that transfers its benefit to another provider before the first provider has the opportunity to claim reimbursement for the discounted device. Accordingly, the waiver allows providers to seek reimbursement for a connected device provided to a household that had been receiving an EBB-supported service from that provider at the time the device was supplied to the household, even if the household subsequently transferred their EBB service benefit to a different provider. The Bureau seeks comment on allowing a provider to claim reimbursement for a connected device where the provider delivered a connected device and ACP-supported service to the household, but the household transferred its benefit to a different provider before the end of the service month. The Bureau also seeks comment on whether other adjustments to the connected device claims process should be considered for the Affordable Connectivity Program. What modifications should the Commission adopt to improve the reimbursement process?

64. The Bureau also seeks comment on the process for resolving disputes involving the connected device reimbursement process. USAC has developed a dispute process to be applied in scenarios where a provider seeks to claim a connected device for a household that has already been claimed by another provider for a connected device. In order to demonstrate that the household is eligible to be claimed by the second provider for a connected device, perhaps because the household contends that it did not receive the connected device from the first provider, the second provider must notify USAC that it wishes to initiate the dispute process. Once the second provider files a dispute, USAC will request from the household's previous provider documentation confirming that the connected device was delivered to the household, the household was charged a co-pay of more than $10 but less than $50 toward the purchase price, and the household consented to purchase the device. USAC will then review the response and documentation provided and determine whether the new provider is eligible to receive reimbursement for the connected device for the household. The Bureau proposes to maintain this dispute resolution process for the Affordable Connectivity Program and it seeks comment on this proposal. What other factors should the Commission consider in developing policies or procedures for ACP connected device claims?

65. The Bureau next seeks comment on EBB household experiences choosing qualifying connected devices for the EBB Program to determine if there are any other improvements the Commission can make to the Affordable Connectivity Program. Did providers offer a broad range of device choices? Data from the EBB Program show that the vast majority of connected devices supported were tablets, with far fewer households receiving laptop or desktop computers. Were the devices offered to households too restrictive or limited in function? Should the Commission require that a connected device be able to connect to all Wi-Fi devices, and not just certain hotspots? The Bureau also seeks comment from providers on what factors they considered in their decisions to offer or not to offer connected devices in the EBB Program.

66. For the EBB Program, the Commission declined to adopt minimum system requirements for connected devices, finding that setting such standards ''could limit consumer choice and exacerbate barriers to broadband service that may have existed prior to COVID–19.'' The Commission instead said that it expected devices to support video conferencing platforms, should be Wi-Fi enabled and have video and camera functions. The Commission also stated that it expected that connected devices be accessible to and usable by those with disabilities. The

Bureau seeks comment on whether the Commission should adopt minimum system requirements and other minimum specifications for connected devices given the longer-term nature of this new program? For example, should the Commission establish a minimum size for tablets to ensure that the screen size is adequate for meaningful use? Given that this is intended to be a long-term program, if the Commission does adopt minimum system requirements, how often should they be updated, if at all?

67. The Bureau also proposes that the Commission apply the requirements of § 54.10 of the Commission's rules to the Affordable Connectivity Program in the same manner as those requirements are applied in the EBB Program. § 54.10 says that a ''Federal subsidy made available through a program administered by the Commission that provides funds to be used for the capital expenditures necessary for the provision of advanced communications service may not be used to'' ''[p]urchase, rent, lease, or otherwise obtain, any covered communications equipment or service,'' or ''[m]aintain any covered communications equipment or service previously purchased, rented, leased, or otherwise obtained.'' § 54.10 further notes that ''covered communications equipment or service'' is defined in section 1.50001 as ''any communications equipment or service that is included on the Covered List,'' and section 1.50001 further defines ''communications equipment or service'' as '' any equipment or service used in fixed and mobile networks that provides advanced communication service, provided the equipment or service includes or uses electronic components,'' and any device that is on a Covered List is one that poses an unacceptable risk to the national security of the United States or the security and safety of United States persons. As discussed in this document, a connected device supported by the Affordable Connectivity Program includes a laptop, desktop computer, or tablet, and the Bureau believes that funds used for such devices could reasonably be considered to be funds for capital expenditures, and further that such capital expenditures could reasonably be considered to be ''necessary for the provision of advanced communications service'' as defined in section 1.50001 and contemplated by § 54.10. The Bureau seeks comment on the application of § 54.10 to the Affordable Connectivity Program and on how the Commission and USAC can verify a provider's compliance with this requirement.

68. *Tribal Lands Benefit.* The Affordable Connectivity Program retains from the EBB Program the enhanced, $75 per month subsidy for households located on Tribal lands. For the EBB Program, the Commission adopted the definition of Tribal lands used in the Lifeline program. That definition covers ''any federally recognized Indian tribe's reservation, pueblo, or colony including former reservations in Oklahoma; Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688); Indian allotments; Hawaiian Homes Lands—areas held in trust for Native Americans by the state of Hawaii, pursuant to the Hawaiian Homes Commission Act, 1920 July 9, 1921, 42 Stat. 108, *et seq.* as amended, and any land designated as such by the Commission for purposes of this subpart pursuant to the designation process in § 54.412.'' The Bureau proposes that the Commission use the same Tribal lands definition from Lifeline and the EBB Program for determining the areas that would qualify for the enhanced benefit in the Affordable Connectivity Program, as well as use the same maps for Tribal lands that are used in those predecessor programs. The Bureau seeks comment on this proposal and on using existing USAC processes for verifying that an eligible household is located on Tribal lands. The Bureau also seeks comment on whether the off-reservation Tribal land designation process for Lifeline in § 54.412 of the Commission's rules should be adopted and used in the Affordable Connectivity Program. Should the Commission consider other changes to the definition of Tribal lands? Are there other factors the Commission should consider?

69. *High-Cost Areas.* The Infrastructure Act also provides for a separate enhanced benefit for households that are served by providers in high-cost areas. The Infrastructure Act requires the Commission to establish a mechanism by which an ACP participating provider in a high-cost area, as defined in a separate section of the Infrastructure Act, may receive an enhanced benefit of up to $75 for broadband service ''upon a showing that the applicability of the lower limit under subparagraph A [the $30 rate] to the provision of the affordable connectivity benefit by the provider would cause particularized economic hardship to the provider such that the provider may not be able to maintain the operation of part or all of its broadband network.'' The Bureau seeks comment on how the Commission can best administer this provision efficiently and with a minimal burden on qualifying households and providers.

70. As a preliminary matter, ''high-cost area'' is defined elsewhere in the Infrastructure Act as the ''unserved area in which the cost of building out broadband service is higher, as compared with the average cost of building out broadband service in unserved areas in the United States (as determined by the Assistant Secretary [of Commerce for Communications and Information], in consultation with the [Federal Communications] Commission).'' The Act further provides that factors to be incorporated into this determination are: (1) The remote location of the area; (2) the lack of population density of the area; (3) the unique topography of the area; (4) a high rate of poverty in the area; or (5) any other factor identified by the Assistant Secretary, in consultation with the Commission, that contributes to the higher cost of deploying broadband service in the area.''

71. Given that the distribution of the enhanced benefit depends on a mechanism that is based on a determination of high-cost areas developed primarily by a separate agency, the enhanced reimbursement to providers for broadband services in high-cost areas cannot be provided until the National Telecommunications and Information Administration (NTIA) identifies such high-cost areas. The Bureau seeks comment on how this mechanism should work once NTIA makes the determination of high-cost areas. What should a provider be required to show to establish that there would be a ''particularized economic hardship to the provider such that the provider may not be able to maintain the operation of part or all of its broadband network'' if the provider is limited to providing a discount of only $30? Should the Commission adopt a specific standard or test for such hardship, and if so, what should it be? Who should decide whether the provider has met such a standard? How should aggrieved providers appeal decisions related to this standard? How should the Bureau take into consideration other subsidies and financial benefits used by the providers to deploy broadband service in these high-cost areas when evaluating provider requests for the enhanced benefit? Are there administrative steps the Commission can take while the NTIA is working to identify the qualifying high-cost areas to speed the development of the mechanism? The Bureau seeks comment on any other

matters related to the mechanism for high-cost areas.

72. The Bureau proposes to provide reimbursement for discounted services and connected devices delivered to a qualifying household after a provider has elected to participate in the Affordable Connectivity Program. The Bureau proposes that participating providers be reimbursed through a process similar to the EBB Claims System administered by USAC, and subject to all the requirements of the Lifeline Claims System. In both the Lifeline and EBB programs, providers are required to submit a reimbursement request through USAC's Claims System based on the number of households enrolled in the NLAD on a specific date each month, called a snapshot date. Providers must review the snapshot report, validate the households for which they are requesting reimbursement, indicate a reason for any unclaimed subscribers, and review, correct, and certify the requested reimbursement amount. In the EBB Program, the Commission also established a uniform snapshot date of the first of each month for EBB claims, finding that having a uniform snapshot date brings efficiencies to the reimbursement process by restricting support to eligible subscribers that are enrolled in NLAD by the snapshot date. The Commission also found that using a uniform snapshot date removes uncertainties for providers regarding the amount that could be claimed if the Commission allowed providers to claim subscribers on a pro-rata basis. For the Affordable Connectivity Program, the Bureau seeks comment on whether the Commission should also adopt a uniform snapshot date for determining the households that are eligible to be claimed for service in a service month, and whether the snapshot date should be the first day of each month. Are there other alternatives to the snapshot paradigm that the Commission should consider for the Affordable Connectivity Program? The Bureau also seeks comment on how alternatives to the snapshot date approach would affect the claims process for connected devices.

73. In the *EBB Program Order,* the Commission required participating providers that are applying both the Lifeline discount and the Emergency Broadband Benefit to a household's supported broadband service to apply the full Lifeline discount first before determining the reimbursement amount claimed under the EBB Program in order to maximize the scarce funding in the temporary EBB Program. The Commission found that this approach was consistent with the requirements of § 54.403(b) of the Commission's rules regarding the application of Lifeline support. The Bureau proposes to adopt this approach for the Affordable Connectivity Program. The Bureau also seeks comment on clarifying that the ''full Lifeline discount'' includes both federal and any state support. The Bureau seeks comment on this idea and whether the Commission would have the authority to require that any benefit provided by a state low-income broadband program be applied before a provider calculates the amount to claim from the Affordable Connectivity Program.

74. The Bureau further seeks comment on whether the Commission should allow providers to claim partial month support. The Affordable Connectivity Program provides a more generous monthly subsidy than the Lifeline program and will extend for a much longer period of time than the EBB Program. As a result of these differences, should the Commission consider allowing for partial month, pro-rated support? Specifically, should the Commission permit a provider to claim for pro-rated, partial reimbursement a household that receives service from the provider during part but not all of a service month? In situations where the household switches to a supported service offered by another ACP provider, should both the former provider and the new provider be able to claim pro-rated partial reimbursement for the household for the same month? How will the use of the snapshot date work with partial claims? What will providers need to change about their billing and claims processes to seek partial month support? Will providers be able to determine the appropriate amount to pass through to the household and also claim from the program? The Commission in the *EBB Program Order* found that ''employing a method that allows for partial claims would be cumbersome to administer.'' The Bureau seeks comment on whether the same consideration applies for a program that is not temporary and is expected to provide support for years. The Bureau also seeks comment on whether allowing providers to claim reimbursement for partial month support would cause customer confusion about the discount they should expect to receive for their ACP-supported service. Beyond customer confusion, what other consumer impacts might result from allowing providers to claim reimbursement for a partial month? Lastly, the Bureau seeks comment on how disputes between providers over appropriate partial month claims should be resolved.

75. Once a provider has received its snapshot report for the previous month, the EBB Program requires the provider to upload and certify its claims by the 15th day of each month, or the following business day in the event the 15th falls on a weekend or holiday. Due to the limited funds and temporary nature of the EBB Program, the Commission concluded that claims cannot be revised after that mid-month deadline. The Commission adopted this approach in part to assist USAC and the Commission in creating a reliable forecast for the limited-funding program. Given the newness of the EBB Program and the number of providers participating, the Bureau has issued waivers allowing these providers extra time to certify the reimbursement claims. Because the Affordable Connectivity Program will extend longer than the EBB Program, the Bureau seeks comment on whether the Commission should offer providers more flexibility regarding the deadlines by when they must certify their claims. The Bureau seeks comment on the length of time providers should have for uploading and certifying their claims for a service month. In addition to the questions posed in this document, the Bureau seeks comment on how any flexibility offered to providers for service claims would impact the claims process for connected devices. Given that the connected device benefit is a one-time benefit, would allowing providers the flexibility to delay the certification of claims interfere with the administration of the claims process for devices? The Bureau seeks comment on the ways the Commission could offer flexibility to the claims process for service and devices while guarding against waste, fraud, and abuse in the program.

76. The Bureau also seeks comment on whether providers should be permitted to revise their certified claims. For example, the Lifeline program has a one-year deadline for upward revisions that increase the amount of funding requested by the provider. The Bureau seeks comment on a reasonable revision period. Should the Commission only allow upward revisions in certain circumstances? If so, what are the circumstances in which a revision would be justified? Because funding for the Affordable Connectivity Program is limited, if the Commission allows revisions, the Bureau seeks comment on imposing reasonable restrictions on upward revisions in the final months of the program when funds are close to exhaustion. Finally, regardless of any rules permitting

revisions, and consistent with the Commission's directives in the *EBB Program Order,* the Bureau proposes that providers would continue to have an obligation to report any non-compliant conduct, including the receipt of excessive payments.

77. The Infrastructure Act retains most of the provider certifications that were required by the EBB Program. Providers are required to certify that: Each household for which the provider is seeking reimbursements will not be charged an early termination fee if it later terminates a contract; each household was not subject to a mandatory waiting period; and each household will be subject to a participating provider's generally applicable terms and conditions. Providers are also required to certify that each household for which the provider is claiming reimbursement for a connected device discount has been charged the required co-pay. Providers claiming a household whose eligibility was determined by the provider's alternative verification process must also certify that such households were verified by a process that was designed to avoid waste, fraud and abuse. The Bureau proposes that these certifications accompany each request for reimbursement, by participating providers, and that each certification be submitted under penalty of perjury. The Bureau also proposes that the Commission model the certifications used in the EBB Program to the extent that they are consistent with the rules adopted for the Affordable Connectivity Program and include any additional certifications that may be appropriate to satisfy new rules for the Affordable Connectivity Program. Should the Commission add any other certifications as a prerequisite to reimbursement? The Bureau proposes to require providers to certify that, for any reimbursement claims for a delivered connected device, the household was charged a compliant co-pay and that the co-pay was collected? Should the provider also be required to certify that it will not charge, or has not charged, the household for the amount for which the provider is seeking reimbursement?

78. The Infrastructure Act includes several additional provisions related to consumer protection that build upon the existing consumer protection measures in the Consolidated Appropriations Act. The Infrastructure Act leaves unchanged the requirements that participating providers must not deny an eligible household the ability to participate in the Affordable Connectivity Program based on any past or present arrearages with that provider. Moreover, providers are still required to certify that subscribers will not be required to pay an early termination fee if the eligible household being claimed elects to enter into a contract to receive such internet service offering and later terminates the contract. Providers must also still certify that the subscriber was not subject to a mandatory waiting period for their ACP-supported service based on having previously received internet service from the provider, and that the household will be subject to the provider's generally applicable terms and conditions as applied to other customers. The Bureau next seeks comment on how to implement the new consumer protection provisions included in the Infrastructure Act.

79. The Infrastructure Act prohibits a participating provider from requiring an eligible household to submit to a credit check as a condition for applying the ACP benefit to that provider's internet service offerings. The Bureau proposes to prohibit providers from inquiring, requesting or otherwise causing a consumer to submit to a credit check, or from accessing a consumer's credit information, before enrolling the consumer in the Affordable Connectivity Program. The Bureau seeks comment on how the Commission should ensure that providers are not requiring households to submit to credit checks as a pre-requisite for enrolling in the Affordable Connectivity Program with the provider. Should the Commission rely on self-certification and require providers to certify under penalty of perjury that the households they are claiming were not subject to credit checks as a condition of enrolling with the provider for the Affordable Connectivity Program? Should this requirement apply to all households enrolled in the Affordable Connectivity Program, or only to new households enrolling in the Affordable Connectivity Program? Must providers make this certification for existing customers? The Bureau seeks comment on its proposal and on other approaches the Commission should consider to ensure that providers are complying with this requirement.

80. The Bureau also seeks comment on whether a credit check may be permitted in certain circumstances. Should the Commission allow providers to use the results of a credit check to determine which equipment or devices may be offered to a household so long as the household has access to equipment or devices necessary to use the ACP-supported service? Should the Commission allow providers to use the results of a credit check for services that are not covered by the ACP benefit if the household selects a bundled service plan? Is permitting use of a credit check under these limited circumstances consistent with the statutory provision prohibiting credit checks as a condition for participation in the Affordable Connectivity Program? Would permitting a provider to use the results of a credit check to determine which plans are made available to a household be inconsistent with this statutory provision?

81. The Infrastructure Act permits a participating provider to terminate a subscriber's access to broadband internet access service supported by the Affordable Connectivity Program after 90 days of non-payment. The Infrastructure Act, however, does not disturb the requirement that providers cannot decline to enroll a household based on ''any past or present arrearages with a broadband provider . . .'' The Bureau seeks comment on how the Commission should reconcile these provisions. Should this non-payment provision apply only to new instances of non-payment associated with the ACP-supported service after a subscriber is enrolled with a participating provider? If a subscriber is de-enrolled for non-payment, how could the subscriber transfer the benefit to a different provider? Could a subscriber de-enrolled for non-payment be able to participate in the Affordable Connectivity Program with a different provider or even re-enroll with the same provider? What options should be available to providers when their ACP subscribers are in non-payment? Should providers be required to mitigate the non-payment by lowering a consumer's service quality (*e.g.,* lowering the customer's download speeds) if the rate of the supported service exceeds the amount of the benefit applied to the consumer's bill? Should the Commission allow for this mitigation? Should the Commission require providers to transmit to NLAD information that will allow the Commission to determine whether the household is assessed and charged a fee for the ACP-supported service after the benefit has been applied?

82. Similar to the EBB Program, the Bureau proposes that providers in the Affordable Connectivity Program must pass through the ACP benefit to households before claiming reimbursement for the discount. Based on the Bureau's experience in the EBB Program, it is concerned that providers may fail to timely apply the ACP benefit to a household's bill after the household is enrolled in the program. In particular, there were complaints that some providers in the EBB Program were

delaying application of the program benefit to subscriber accounts for an unreasonable period of time. Subscribers reported to the Commission that, because the EBB Program benefit was not timely applied, they were sent to collections or experienced service interruptions. The Bureau seeks comment on how to address situations where the provider fails to apply the ACP benefit to a household's bill consistent with the Commission's rules and, as a result, the household does not receive the benefit and is required to pay the full amount for the internet service. Should the Commission affirmatively require that providers immediately apply the discount to a household's broadband bill or consumer account upon enrollment in the Affordable Connectivity Program? Should providers have to apply the ACP benefit to the consumer's account before being able to terminate access to the supported service for non-payment?

83. To prevent undue termination of service and loss of vital benefits, the Bureau proposes to require participating providers to provide adequate notice to subscribers of their delinquent status before terminating the subscriber's service for non-payment. The Bureau seeks comment on this proposal, specifically on the frequency of notice, timing, and method of communicating the notice. The Bureau also seeks comment on whether the Commission should develop a process by which subscribers may dispute their provider's claim of non-payment. The Bureau seeks comment on the process for households to dispute allegations of non-payment with the provider and whether the provider could terminate the household's internet service for non-payment pending resolution of the dispute.

84. The Infrastructure Act requires the Commission to establish a dedicated complaint process for Affordable Connectivity Program participants to file complaints about the compliance of participating providers with program rules and requirements, including complaints ''with respect to the quality of service received under the Program.'' The Bureau seeks comment on this requirement, generally, including how the Commission should measure quality of service received under the Program?

85. To date, consumers have used the Commission's Consumer Complaint Center to file EBB-related informal complaints against their providers with the Commission. The Commission's informal consumer complaint process is a long-standing, free, and effective way for consumers to raise issues with their providers and bring issues to the attention of the Commission. To comply with the requirements of the Infrastructure Act, the Bureau proposes that the Commission add Affordable Connectivity Program content to the Consumer Complaint Center to educate consumers about the program, a dedicated pathway in the Consumer Complaint Center to file ACP-related complaints, including notification to the providers that the complaint involves the Affordable Connectivity Program, clear direction to consumers on how to correctly file an ACP complaint, and dedicated Commission staff from the Commission's Consumer and Governmental Affairs Bureau (CGB) to review and process the complaints. The Bureau seeks comment on these proposals. Are there other ways the Commission can provide improvements to its existing informal consumer complaint process to benefit the dedicated complaint process for ACP participants? What, if any, additional changes or modifications should the Commission make to the existing informal consumer complaint process to comply with the Infrastructure Act requirement?

86. The Infrastructure Act also requires the Commission to act expeditiously to investigate potential violations of program rules and requirements and to enforce compliance. Moreover, the Commission is permitted to impose forfeiture penalties to enforce compliance. Consistent with this statutory direction, the Bureau proposes to use the Commission's existing, statutorily permitted enforcement powers to initiate investigations of program rule violations. The Bureau seeks comment on this proposal.

87. The Infrastructure Act also requires participating providers to provide Affordable Connectivity Program participants with information on the Commission's dedicated complaint process. Should the Commission require participating providers to prominently display the Commission's contact center phone number and the website address for the Commission's Consumer Complaint Center on the subscriber's bill, on the provider's Affordable Connectivity Program web page, and on all of the provider's marketing materials? The Bureau seeks comment on how information about the dedicated consumer complaint process should be disseminated to consumers. If a consumer complains to the participating provider regarding an ACP-supported service or any difficulty enrolling with the provider, does the provider have an obligation under the statute to inform the consumer of their right to file a complaint with the Commission? If not, should the Commission require participating providers to do so?

88. The Infrastructure Act also requires the Commission to regularly issue public reports regarding consumer complaints alleging provider non-compliance with the Affordable Connectivity Program rules. The Bureau seeks comment on what these statutorily mandated reports should include, the frequency of such reports, and the method by which the reports should be made available to the public. How should the Commission balance subscriber privacy and its obligations under the Privacy Act with the need for transparency when determining the contents of those reports?

89. The Infrastructure Act mandates that the Commission promulgate additional rules to protect consumers who participate in or seek to participate in the Affordable Connectivity Program. As a preliminary matter, the Bureau notes that the Infrastructure Act states that the Commission must craft these particular rules ''after providing notice and opportunity for comment in accordance with section 553 of title 5, United States Code,'' which is the Administrative Procedure Act (APA). At the same time, section 904(h) provides an exemption from APA requirements for ''regulation[s] promulgated under subsection (c),'' the general rulemaking for section 904, which includes the consumer protection requirements. The Bureau seeks comment on how the Commission should reconcile these apparently conflicting provisions.

90. In the event that the Commission concludes that the Infrastructure Act requires the consumer protection rules to be implemented through APA notice-and-comment rulemaking, the Bureau seeks comment on whether the Commission could find that there is good cause to depart from those requirements. The APA generally requires us to adopt rules only after publishing a Commission-level ''general notice of proposed rule making'' in the **Federal Register** and providing a reasonable comment period after the **Federal Register** publication. In addition, the APA generally requires that final rules be effective no sooner than 30 days after publication in the **Federal Register**. Complying with these APA rulemaking requirements for this set of consumer protection rules would push the effective date of these rules at least two months beyond the December 31 effective date of the delayed amendments to the statute. Under these circumstances, would there be good

cause for other than strict adherence to the APA requirements?

91. As for the substantive topics the Commission must evaluate, the Infrastructure Act requires that the Commission promulgate rules prohibiting any inappropriate upselling or downselling by a provider. The Bureau first seeks comment on what practices constitute inappropriate upselling or downselling. Are upselling or downselling always inappropriate, or are there instances where such practices are beneficial to the consumer? If so, when is upselling or downselling appropriate? What, if any, upselling or downselling practices should be permitted?

92. The Infrastructure Act also requires that the Commission promulgate rules that would protect consumers in the Affordable Connectivity Program from any inappropriate requirements that a consumer opt-in to an extended service contract as a condition of participating in the Affordable Connectivity Program. The Infrastructure Act, however, does not alter the requirement from the EBB Program that participating providers must certify that an eligible household will not be required to pay an early termination fee if the household elects to enter into—but later terminates—a contract for internet service. The Bureau first seeks comment on what constitutes an inappropriate opt-in requirement. Can a provider require an opt-in to a longer term contract before the household enrolls in the Affordable Connectivity Program? Should the Commission prohibit opt-ins prior to enrollment in all situations? Or are there times when pre-enrollment opt-in is beneficial to the enrolling household? Are there circumstances where an extended service contract would be beneficial to consumers, and if so, what are those circumstances? The Bureau also seeks comment on the tension between the consumer protection provisions described in this document. How should the Commission determine the circumstances in which requiring an extended service agreement would be inappropriate in light of the requirement that providers must also certify that the household will not be required to pay an early termination fee?

93. The Infrastructure Act also prohibits providers from implementing any inappropriate restrictions on the ability of a customer to switch internet service offerings. Should the Commission prohibit providers from limiting their ACP-supported service offerings to new or existing customers? How can the Commission determine what constitutes an inappropriate restriction? Are there any restrictions on the ability to switch internet service offerings that would be considered appropriate, and if so, under what circumstances would such restrictions be appropriate? What restrictions should the Commission prohibit or permit?

94. The Infrastructure Act requires the Commission to promulgate rules to protect consumers from any inappropriate restrictions by a participating provider on the ability of a consumer to switch participating providers other than a requirement that the customer return customer premises equipment provided by the participating provider. The Bureau seeks comment on what constitutes an inappropriate restriction of a consumer's ability to switch participating providers? Should the Commission prohibit providers from seeking to recover any discounts passed through to the household if the provider is unable to claim the household as a result of the transfer? Should an attempt or threat to recover the discount be considered an inappropriate restriction on the consumer's ability to switch providers? What restrictions should the Commission prohibit or permit? Have there been any practices by providers in the Lifeline or EBB Programs that have the effect of restricting a consumer from transferring their benefit to another provider? For example, should the Commission require that a provider offer a way for the customer to de-enroll online and also provide sufficient customer care representatives to respond to customers' requests or calls within a certain time (*e.g.,* 30 minutes)? Should failure to provide reasonable customer care operations be considered a sufficient reason to delist the provider?

95. Additionally, the Infrastructure Act requires that the Commission promulgate rules related to unjust and unreasonable acts or practices that undermine the purpose, intent, or integrity of the Affordable Connectivity Program. The Bureau seeks comment on what additional consumer protection measures the Commission should enact to protect prospective and existing program participants. For example, to ensure that eligible households receive their ACP-supported service without delay, should the Commission require that providers enroll eligible households or transfer their benefit within a set time after the subscriber provides affirmative consent to enroll with the provider and that failure to do so constitutes an unjust and unreasonable practice? The Bureau seeks comment on what steps the Commission should take to ensure that providers pass through the Affordable Connectivity Program discount to subscribers. The Bureau also proposes to prohibit providers from unreasonably delaying the application of Affordable Connectivity Program discounts to subscribers' bills.

96. The Bureau also seeks comment on how USAC and the Commission can best address provider misconduct to avoid consumers being subject to potential fraudulent activity that could or may have already occurred. What is the best method to notify the public of any such conduct? How can the Commission address circumstances where an unauthorized provider holds itself out to consumers as a participating provider in the Affordable Connectivity Program? How should the Commission treat misconduct by providers authorized to participate in the Affordable Connectivity Program? Should the Commission have requirements for how the Affordable Connectivity Program is advertised and promoted, with remedies for violations of those requirements? The Bureau further proposes that failure to provide the service that is advertised and promoted shall be considered a violation of ACP program rules. The Bureau seeks comment on these proposals and other protections the Commission should consider based on commenters' experiences with the EBB and Lifeline Programs.

97. The Bureau next seeks comment on the disclosures and consumer consent providers participating in the Affordable Connectivity Program should be required to make before enrolling consumers in the program. In the EBB Program, for example, the Commission required participating providers to make several disclosures to their customers and to obtain their consent before enrolling them in the program. Specifically, providers are required to disclose to an existing subscriber prior to enrollment that the EBB Program is a government program that reduces the customer's broadband internet access service bill, is temporary in nature, that the household will be subject to the provider's undiscounted rates and general terms and conditions at the end of the program if they continue to receive service, that the household may obtain broadband service supported by the EBB Program from any participating provider of its choosing, and that the household may transfer its EBB Program benefit to another provider at any time. Additionally, Lifeline enrollees must opt in or affirmatively request enrollment in the EBB Program.

98. For the Affordable Connectivity Program, the Bureau proposes requiring that providers make similar disclosures

to all consumers before enrolling them in the program. The Bureau proposes that the disclosures describe that the Affordable Connectivity Program is a government program that reduces the customer's broadband service bill up to the maximum benefit amount for that household, and that the household would be subject to the undiscounted service rate and generally applicable terms and conditions upon de-enrollment from the program and/or at the program's end. Given that the Affordable Connectivity Program is a longer term program compared to the EBB Program, the Bureau seeks comment on what the disclosure should state about the Affordable Connectivity Program's length that would be useful and informative for the household. The Bureau also proposes that the disclosure notify the household of its ability to file a complaint against its provider through the Commission's Consumer Complaint Center and that a provider may disconnect the household's ACP-supported service for non-payment as described in the Infrastructure Act. If the Commission adopts a recertification requirement for the Affordable Connectivity Program, should the disclosure advise households of that as well? The Bureau also proposes that households be notified that they can apply the ACP benefit to any broadband service offering of the participating provider, at the same terms available to households that are not eligible for ACP-supported service. The Bureau seeks comment on these disclosures and ask what other information is essential for a household to know about the Affordable Connectivity Program and the rights of consumers under the program when enrolling with a provider? As is required in the EBB Program, the Bureau proposes to require participating providers to collect and retain documentation demonstrating that the household was provided these disclosures before enrolling with the provider. The Bureau seeks comment on what types of documentation providers should retain to demonstrate compliance with notice and consent requirements. What should constitute proof of opt-in or affirmative consent?

99. The EBB Program rules also require participating providers to collect and retain documentation that the provider, before enrolling an existing subscriber in the EBB Program, gave the subscriber notice, among other things, that they may transfer their EBB Program benefit to another provider at any time. The EBB Program rules further require that service providers ''obtain, from each new and existing subscriber, consent to transmit the subscriber's information'' to the NLAD. § 54.1606(d)(2) of the Commission's rules also prohibits providers from providing EBB-supported service or claiming support for a consumer that is currently receiving an EBB-supported service if the consumer is not ''seeking to transfer his or her Emergency Broadband Benefit.'' However, some providers report that households enrolled in the EBB Program are being transferred to new providers perhaps even without the household's consent or knowledge of the transfer or its effect on the household's existing service. The Bureau seeks comment on EBB participating providers' experience with transfers of households between providers in the EBB Program. Are there restrictions or requirements the Commission should implement to ensure that a household has fully consented to transfer its benefit at the time of transfer? Should the Commission consider limiting the number of times a household can transfer its benefit per month in order to assist providers in managing the application of the discount on their subscriber's ACP-supported service? Is there some other metric or benchmark by which the Commission can determine if or when to impose an appropriate limitation on transfers? Should the Commission require that households independently verify a request to transfer? How should such verification take place? How will the Commission balance these limitations with the importance of allowing households freedom to move between providers? What is the harm, if any, of households switching between participating providers, given the importance of household choice in selecting the preferred provider? The Bureau also seeks comment on its proposal to require participating providers, before transferring-in a household, to clearly disclose in easily understood language that the household will be transferred and that the ACP benefit will now be applied to the transfer-in provider's service.

100. In addition to a disclosure requirement, the Bureau proposes that participating providers seeking to enroll any subscriber in the Affordable Connectivity Program must obtain that household's affirmative consent after the household has reviewed the program disclosures and before the provider can enroll the household in the program. The Bureau also proposes that such consent must be obtained by a provider performing a transfer transaction for a subscriber already enrolled in the program. How should the new provider record and document the transfer request? How should notice of a transfer be communicated to the household? Should providers be required to provide written notice to the household that it has been transferred and enrolled in the program with the new provider? Should providers be required to confirm the household's transfer request before and/or after initiating the transfer? Should providers be required to certify that all transfers completed by the provider are bona fide, requested by the household, and made pursuant to program rules? As in the EBB Program, the Bureau proposes to require providers to obtain a record of this affirmative consent from the household and to make such documentation available to the Commission and USAC upon request and in a timely manner. The Bureau proposes that such documentation clearly identify subscriber information, the date consent was given, and the method of consent. The Bureau seeks comment on what form such consent should take. In the EBB and Lifeline Programs, a subscriber's oral consent is an acceptable form of consent. For the Affordable Connectivity Program, should the Commission consider requiring providers to obtain written consent from a subscriber prior to transferring or enrolling the subscriber rather than allowing oral consent? The Bureau also proposes to prohibit a participating provider from linking consent to enroll in the Affordable Connectivity Program with some other action or program, or from automatically enrolling a subscriber based on information provided by the subscriber for some other purpose. For example, the Bureau proposes that participating providers be required to obtain consent for participation in the Lifeline program, the EBB Program, and the Affordable Connectivity Program separately. The Bureau also seeks comment on a proposal to prohibit providers from requiring a consumer to accept a connected device in order to enroll with the provider.

101. Moreover, the Bureau seeks comment on when providers can begin to obtain a subscriber's consent to enroll in the Affordable Connectivity Program. Similar to the approach in the EBB Program, the Bureau proposes that only providers with an election notice for the Affordable Connectivity Program fully processed by USAC can provide disclosures and collect consents from subscribers regarding their interest in enrolling in the Affordable Connectivity Program. The Bureau seeks comment on

this proposal. What else should the Commission consider to protect consumers from being unwittingly enrolled in the Affordable Connectivity Program or transferring their ACP benefit? The Bureau seeks comment on these proposals.

102. The *EBB Program Order* also requires providers to collect an affirmative opt-in from EBB households before they can be charged ''an amount higher than they would pay under the full EBB Program reimbursement amount permitted'' by the program's rules. The Bureau proposes that the Commission adopt a similar requirement for the Affordable Connectivity Program. The Bureau seeks comment on what notice and opt-in requirements are necessary to protect households from unexpected charges and to prevent providers from providing unwanted and undiscounted broadband service to low-income consumers. Given that the Affordable Connectivity Program is expected to be a longer-term program, the Bureau seeks comment on when, during a household's participation in the program, providers should be required to obtain the affirmative consent from the households to continue providing the household broadband service after the end of the program and to charge it a rate higher than what it would pay if it were receiving the full discount permitted under rules for the Affordable Connectivity Program. Does collecting such consent from households at the time of enrollment fully inform households and adequately protect them from unexpected charges? If providers are permitted to collect consent at the time of enrollment to continue service after the program end date, how should providers be required to give notice to consumers before raising the price of the service? If the Commission were to allow this affirmative opt-in to be collected at the time of enrollment, the Bureau proposes that providers be prohibited from imposing, as a condition of enrollment, an affirmative opt-in to continue receiving service from the provider after the end of the program, or de-enrollment. In other words, the Bureau proposes that households should be permitted to decline to provide this opt-in at the time of enrollment. The Bureau seeks comment on these issues.

103. The Bureau recognizes that providers will need time to prepare the necessary disclosures and ensure they have mechanisms in place for obtaining and capturing a consumer's affirmative consent before enrolling the household in the program. The Bureau seeks comment on the time that providers need to make changes to their disclosure and consent mechanisms for purposes of the Affordable Connectivity Program. What would be the earliest date that providers could make these changes and be ready to enroll new subscribers in the Affordable Connectivity Program? Is there a concern that if providers may be unable to develop required disclosures and consent mechanisms in time for the launch of the Affordable Connectivity Program, providers may delay enrolling households until those systems are in place to ensure that enrollment of consumers is compliant with program rules?

104. The Infrastructure Act also requires participating providers to notify all consumers who either subscribe to or renew a subscription to an internet service offering about the Affordable Connectivity Program and how to enroll. The Bureau seeks comment on this requirement. What does it mean to ''renew'' a subscription for the purposes of this requirement? What are effective methods or best practices providers should employ to ensure that such notifications occur? Should the Commission, for example, require providers to certify when they submit claims for reimbursement that they have provided such notifications to the households? What, if anything, should the Commission require of participating providers to ensure their subscriber base is informed about the Affordable Connectivity Program? Should the notification about the existence of the Affordable Connectivity Program be provided in the consumer's preferred language? What policies or practices should the Commission enact to monitor compliance with this statutory obligation? The Bureau seeks comment on whether providers will have adequate time to train their customer service representatives and prepare their systems in order to provide the required information to consumers on the December 31, 2021 effective date of the Affordable Connectivity Program.

105. Pursuant to the Infrastructure Act, the Commission must collaborate with relevant Federal agencies to ensure a household that participates in any program that qualifies it for the Affordable Connectivity Program is provided with information about the Affordable Connectivity Program, including enrollment information. The Bureau seeks comment on how the Commission could collaborate with such agencies. The Bureau also seeks comment on how state and federal agencies that operate qualifying programs can best support eligible households. Is there a role for these agencies in educating qualifying consumers about the Affordable Connectivity Program? The Bureau also seeks comment on what information about the Affordable Connectivity Program the Commission should distribute to households participating in a qualifying program.

106. The Infrastructure Act also requires the Commission to ''ensure relevant Federal agencies update their Systems of Records Notices'' to ensure that a household participating in a qualifying program is provided information about the Affordable Connectivity Program. The Bureau seeks comment on how, and whether the Commission has the authority, to compel other agencies to update their System of Records Notices to the extent required to ensure that a household participating in an ACP-qualifying program receives information about the program. The Bureau seeks comment on the steps the Commission could take to ensure that other agencies update their System of Record Notices to allow the use of personally identifiable information in order to share information about the Affordable Connectivity Program.

107. The Infrastructure Act also provides that the Commission may conduct outreach efforts to encourage households to enroll in the Affordable Connectivity Program. The Act permits the Commission to facilitate consumer research, conduct focus groups, engage in paid media campaigns, provide grants to outreach partners, and provide an orderly transition for participating providers and consumers from the EBB Program to the Affordable Connectivity Program. How should the Commission utilize these statutorily provided tools to inform the public about the program? What topics should the Commission include in consumer research and/or focus groups? What methods of consumer research are proving effective in the current pandemic environment?

108. While the Commission administers various types of federal financial assistance programs, it does not have experience with the unique statutory and regulatory requirements applicable to grant programs. As such, the Bureau seeks comment on considerations applicable to standing up a grant program in support of consumer outreach. For example, should grants be used as part of the Commission's first consumer outreach efforts under the modified program or might grants instead be best utilized as part of the longer term program management?

109. The Bureau also seeks comment on the ability to engage in paid media campaigns. What types of paid media

will be most effective in reaching eligible households? Will social media and other types of online advertising be effective? How should the Commission allocate funding for paid media? Are there effective media strategies developed or used by stakeholders to promote the EBB Program that could inform the Commission's efforts?

110. The Infrastructure Act also permits the Commission to provide grants to outreach partners. The Bureau first seeks comment on any considerations specific to starting a grant program for consumer outreach partners. Should the Commission itself provide such grants? What types of outreach activities should the grants support? The Bureau seeks comment on the scope and objectives of the outreach plans. What outreach gaps were identified during the EBB Program that grant funding could be effective in addressing? What criteria should the Commission use to review and accept grant proposals? What reporting requirements should the Commission establish for grant recipients? Should the Commission impose restrictions on who may participate as an outreach partner? Should the Commission institute a cap on the individual grant amount and if so how much should that funding cap be? What expenses should be allowed under the grant program? Should the Commission allow grant funding to cover personnel costs, such as salaries, and other financial benefits? Should the Commission limit the activities and administrative expenses that grant funds can be used to cover? How much of the total funding amount should the Commission set aside for grants to outreach partners? What safeguards should the Commission consider to prevent fraud and waste in a potential ACP grant program? Grant application processes and required reporting can be burdensome and may discourage smaller, locally focused organizations from applying. How can the Commission balance the need for grant oversight with the desire to make the grant program within reach for non-profits that are best positioned to serve their local communities?

111. In addition to the examples listed in the Infrastructure Act, are there other tools the Commission should consider utilizing to increase the effectiveness of program outreach efforts? Effective provider outreach and implementation of the Affordable Connectivity Program will also encourage program enrollment. Should the Commission share consumer feedback on the EBB Program and the results of ACP consumer research with providers to inform their outreach and implementation efforts? Are there legal or policy considerations that might impact sharing such information with providers? How can the Commission best share this consumer feedback and research results? Are there lessons learned or effective strategies developed or used by stakeholders, partners or providers to promote the EBB Program that should inform the Commission's ACP outreach? What are best practices the Commission should employ in its outreach efforts? The Infrastructure Act also provides an amount of funding appropriated to the Commission for the Affordable Connectivity Program. The Bureau seeks comment on how the Commission should allocate funding to these outreach projects. In the absence of funds appropriated expressly for this outreach, should the Commission allocate some of the administrative funds permitted by the statute to this outreach? How much of the funding should the Commission set aside for outreach?

112. The Infrastructure Act requires participating providers, in collaboration with state agencies, public interest groups, and non-profit organizations, to carry out public awareness campaigns in their areas of service that highlight the value and benefits of broadband internet access service, and the existence of the Affordable Connectivity Program. The Bureau seeks comment on the best methods to publicize the availability of broadband services and connected devices supported by the Affordable Connectivity Program. What are the most effective means of publicizing the benefit to the communities most in need? The Bureau also seeks comment on whether the Commission should require providers to market the Affordable Connectivity Program in the languages spoken in the areas they serve. The Bureau proposes that providers be required to include in promotional materials how consumers can enroll in the program, including how consumers can best contact the provider in order to enroll in the Affordable Connectivity Program. The Bureau seeks comment on these proposals. The Bureau also seeks comment on the most effective ways providers can collaborate with state agencies, non-profit organizations, and public interest groups to promote the Affordable Connectivity Program.

113. The Bureau next seeks comment on an advertising requirement. The Lifeline program requires providers to ''publicize the availability of Lifeline service in a manner reasonably designed to reach those likely to qualify for the service.'' Specifically, providers must ''[i]ndicate on all materials describing the service, using easily understood language, that it is a Lifeline service, that Lifeline is a government assistance program, the service is non-transferable, only eligible consumers may enroll in the program, and the program is limited to one discount per household.'' The Bureau proposes that the Commission adopt a similar advertising requirement for the Affordable Connectivity Program. The Bureau seeks comment on requiring participating providers to indicate on all materials describing the Affordable Connectivity Program the eligibility requirements for consumer participation; that the Affordable Connectivity Program is non-transferrable and limited to one discount per household; a list of qualifying connected devices, if any, with device specifications; the provider's customer service telephone number, which must be prominently displayed on all promotional materials and on the provider's website; and that the Affordable Connectivity Program is a federal government benefit program operated by the Federal Communications Commission and, upon its conclusion, or when a household is no longer eligible, customers will be subject to the provider's regular rates, terms, and conditions. The Bureau seeks comment on its proposal to require providers to clearly display on their website the monetary charges to the customer, and the available upload/download speeds and data caps for its internet service offerings. What other information should providers be required to include in their ACP-related marketing materials? The Bureau also seeks comment on whether there are any marketing practices in the EBB Program that were misleading to customers.

114. The Infrastructure Act provides that the Commission may issue guidance, forms, instructions, publications, or technical assistance as necessary or appropriate to carry out the Affordable Connectivity Program. This authorization includes actions intended to ensure that ''programs, projects, or activities'' are completed in a timely and effective manner. The Bureau seeks comment on the meaning of this provision. The Bureau proposes that this provision suggests that the Commission should continue to work with USAC and others to ensure that the administrator, providers, and consumers have the tools necessary to meaningfully implement and participate in this program. The Bureau seeks comment on what guidance from the Commission would be helpful for providers. What resources would be helpful to consumers looking to participate in the

program? Are there aspects of the current EBB Program enrollment process that need additional explanation or more detailed instructions? Similarly, what resources would help providers looking to participate in the program? For the EBB Program, USAC offered provider training and office hours, added training materials to the provider-focused website, and sent bulletins to providers on system changes and new enrollment features. Nevertheless, would additional explanation or more detailed instructions on program process or systems help providers to better serve their program eligible customers? How else can the Commission ensure that this program is implemented effectively?

115. In the *EBB Program Order,* the Commission instructed USAC to develop a tracker that reported on disbursements and program enrollment to allow providers and the public to monitor the balance of the Emergency Broadband Connectivity Fund and prepare for the end of the program. The tracker is available to the public on USAC's website and includes data on EBB Program enrollment nationwide, by state, and by three-digit ZIP code areas that is updated weekly, and the total claims made by providers each month. To provide more information about where subscribers are enrolling in the EBB Program, the Commission released more granular enrollment data that included enrollee demographic information, such as age breakdown, eligibility category, type of broadband service, and enrollment numbers by five-digit ZIP code areas, all of which are updated monthly. The Bureau seeks comment on how stakeholders used the data available on the EBB Enrollments and Claims Tracker and whether enrollment and claims data regarding the Affordable Connectivity Program would be similarly useful. Should the Commission consider any modifications to the type or format of the public data reports, as well as the frequency of updates, for the Affordable Connectivity Program? In suggesting data to report publicly, commenters should consider the limitations on the Commission's ability to make available personal identifiable information on the households enrolled in the program.

116. The Bureau also seeks comment on the performance measures the Commission should use in determining the success of the Affordable Connectivity Program. How should success in the Affordable Connectivity Program be defined? The Commission, for example, set three program goals for the Lifeline program: (1) Ensuring the availability of voice and broadband service for low-income Americans; (2) ensuring the affordability of broadband service for low-income Americans; and (3) minimizing the contribution burden on consumers and businesses. In the *2016 Lifeline Order,* 81 FR 33025, May 23, 2016, the Commission stated that it will measure its progress toward achieving the affordability prong of the goal by ''measuring the extent to which voice and broadband service expenditures exceed two percent of low income consumers' disposable household income as compared to the next highest group.'' The Bureau seeks comment on the goals the Commission should adopt for the Affordable Connectivity Program. How should the Commission consider the concepts of broadband affordability, adoption, and availability for low-income households? The Bureau also seeks comment on the extent to which the Commission should measure the cost effectiveness of administering the Affordable Connectivity Program.

117. Should the Commission track how the Affordable Connectivity Program is delivering value to low-income consumers? If so, how can this be measured? Should the Commission consider evaluating take-up rates in communities with low connectivity? Should service type or quality be considered in an analysis? Further, should the Commission seek to understand whether the Affordable Connectivity Program is expanding the market for broadband by enrolling subscribers with no existing broadband service as opposed to those that apply the subsidy to an existing plan? If so, what information should the Commission require that providers submit to understand this distinction? What additional measures of performance should the Commission consider, and what information might be requested from providers to measure performance? Should the Commission use participation rates to measure program performance? To calculate those participation rates, how should the Commission estimate the program eligible population, especially given the limitations in data collection due to the ongoing pandemic? Should data be collected on enrollees' current internet access when applying? If so, should this data be collected from providers or enrollees? What additional data are needed to accurately estimate ACP eligibility? The Bureau seeks comment on the availability of such data and recommended approaches for collection, such as requiring participating providers to submit household eligibility information. Should the Commission consider prioritizing reaching certain demographics of low-income consumers and develop targeted outreach? Should the Commission seek to collect additional demographic information about ACP subscribers and, if so, how can the burdens to consumers and providers be minimized? How might this information be used in measuring the success of the Affordable Connectivity Program? The Bureau seeks comment on whether the Commission should identify goals for this program and how the Commission can measure its success in meeting those goals. Should the success of the Affordable Connectivity Program be measured against Lifeline or the EBB Program? Given that Lifeline-eligible households will be eligible for the Affordable Connectivity Program, how should the Commission judge the concurrent performances of the two programs? Are there any additional data that Lifeline providers participating in the Affordable Connectivity Program can provide to the Commission that can be used to judge any substitution or complementarity between Lifeline and the Affordable Connectivity Program?

118. Given that the Affordable Connectivity Program is anticipated to be a longer-term program than the EBB Program, what data should the Commission ask providers to submit to judge the efficacy of the Affordable Connectivity Program? The subsidy provided by the Affordable Connectivity Program is larger than that provided by the Lifeline program. As such, should the Commission ask ACP providers to submit summary statistics on subscribers' usage of plan features (*e.g.,* mobile data usage) to gauge whether the Affordable Connectivity Program is providing value to households beyond what the Lifeline program offers? The Bureau also seeks comment on what data providers should submit regarding the service type a household is receiving. Currently, providers in the EBB Program indicate the type of service a household receives through the EBB Program. Should the Commission also ask ACP providers to indicate the service plan characteristics—such as upload and download speeds, data allowances, and co-payment—associated with a subscriber's service plan? If this information were required, what is an appropriate frequency (*e.g.,* quarterly, semi-annually) for providers to submit such data on a recurring basis? Is there a method of submission that would

minimize burden on providers (*e.g.,* via NLAD at the time of enrollment)?

119. As explained in this document, the Infrastructure Act provides for a 60-day transition period for ''households that qualified'' for the EBB Program prior to the December 31, 2021 effective date, that would otherwise see a reduction in their benefit as a result of the changes made through the delayed amendments concerning the eligibility criteria and discount level for the Affordable Connectivity Program. During the transition period, the Bureau proposes that households enrolled in the EBB Program as of December 31, 2021 would not be required to submit a new application to enroll in the Affordable Connectivity Program. However, before the end of the 60-day transition period, EBB-enrolled households that qualified for the EBB Program through eligibility criteria that are not applicable to the Affordable Connectivity Program will be required to demonstrate their eligibility to receive an ACP benefit after the transition period ends. The Bureau expects this requirement will affect only a small number of households currently enrolled in the EBB Program. The Bureau will provide guidance on the processes that this subset of EBB-enrolled households will need to complete in order to demonstrate eligibility to receive the ACP benefit after the transition period.

120. The Bureau also proposes requiring all households seeking to participate in the Affordable Connectivity Program, including EBB-enrolled households that are eligible for the Affordable Connectivity Program, to opt-in or affirmatively request enrollment in the Affordable Connectivity Program. Moreover, the Bureau proposes to require EBB-enrolled households transitioning to the Affordable Connectivity Program that share an address with another ACP household to verify that they are only obtaining one ACP benefit per household, by either completing the one-per-household worksheet, or a similar process under a provider's approved alternative verification process. However, given that these EBB-enrolled households would have completed a worksheet for the EBB Program already, the Bureau proposes that such households may complete the worksheet for the Affordable Connectivity Program after the 60-day transition period if necessary. The Bureau seeks comment on this proposal and the timing for the confirmation of the household's compliance with the one-per-household requirement. The Bureau believes that these approaches for EBB Program-enrolled households transitioning to the Affordable Connectivity Program would best promote an orderly transition and minimize administrative burdens on participating households. The Bureau seeks comment on these proposed approaches.

121. The Bureau next seeks comment on establishing a deadline by when EBB-enrolled households that are eligible for and intend to participate in the Affordable Connectivity Program must opt in or affirmatively request enrollment in the Affordable Connectivity Program after the end of the 60-day transition period. Would it be feasible to require EBB-enrolled households to opt in or request enrollment by the end of the transition period? Are there alternatives to requiring ACP opt-in that the Commission should consider for EBB-enrolled households that remain eligible for the Affordable Connectivity Program and previously consented to continue receiving service from their provider at the end of the EBB Program? Given that the Affordable Connectivity Program is a new program with a different benefit amount, the Bureau is concerned by the idea of allowing providers to rely on prior consent for the EBB Program for enrollment in the Affordable Connectivity Program. The Bureau also seeks comment on how to treat an EBB-enrolled household that remains eligible for the Affordable Connectivity Program but does not provide opt-in or affirmatively request enrollment to participate in the Affordable Connectivity Program by any deadline the Commission may adopt.

122. The Bureau seeks comment on service provider notice requirements for EBB-enrolled households that transition to the Affordable Connectivity Program and would experience a change in their benefit level at the end of the 60-day transition period. Should the Commission require that participating providers issue notices to consumers with the same content as was contemplated for the 15-day and 30-day end of EBB Program notices in the EBB Program rules, with modifications as necessary to comport with the Affordable Connectivity Program rules? The Bureau seeks to minimize the potential for consumer confusion, and seeks comment on when the rate change notices should be issued to these consumers. Would 30-days' notice be sufficient time to allow consumers to prepare for the reduced benefit amount under the Affordable Connectivity Program? Should the Commission adopt a uniform deadline for these consumer notices, such as 30 days before the end of the transition period, or should the timing of the notices coincide with consumer billing cycles? Would a single notice be sufficient to communicate any rate changes that occur as a result of the changed benefit amount under the ACP? Should the Commission require that the notices make clear that consumers can cancel their service before the rate change takes effect? Would it be sufficient for service providers to notify consumers of the expected rate change under the Affordable Connectivity Program via a bill message? The Bureau seeks comment on these ideas.

123. The Infrastructure Act also contains language addressing a transition period for certain households. In particular, legislative text in the Delayed Amendments provides that, after December 31, 2021, an eligible household that was participating in the EBB Program on the date of enactment and that also qualifies for the Affordable Connectivity Program ''shall continue to have access to an affordable service offering.'' The Bureau seeks comment on this language and its relation to the 60-day transition period into the Affordable Connectivity Program for all households enrolled in the EBB Program starting on December 31, 2021. What is intended by the language providing that such households ''shall continue to have access to an affordable service offering''? What are the outer bounds on the period of time when such households shall no longer continue to have access? What is the purpose of the language limiting such households to those that were participating the EBB Program on the date of enactment?

124. *Database Connections for the Affordable Connectivity Program.* Access to program databases for automated eligibility verification is essential to an optimal household application experience in the National Verifier. While the existing computer matching agreements (CMAs) allow USAC to continue utilizing the National Verifier's EBB Program connections for purposes of the Affordable Connectivity Program, accessing eligibility databases for WIC, a new eligibility program under the Affordable Connectivity Program, will likely require new or amended CMAs and interconnection security agreements with each of USAC and the Commission's state partners. Both USAC and the states will also need to undertake technical development to build those connections. The Bureau invites comment on these challenges and potential solutions to avoid delays in establishing eligibility database connections for the Affordable Connectivity Program.

125. In addition, the Infrastructure Act contemplates data sharing with the Department of Health and Human Services (HHS), USDA and the Department of Education by requiring the Secretaries of those agencies to execute a Memorandum of Understanding with USAC to share National Verifier data and to begin sharing such data shortly after executing the Memorandum. The Bureau seeks comment on data maintained by these agencies that could be used by the National Verifier to speed enrollments in the Affordable Connectivity Program and combat program waste. In the case of USDA, the Bureau seeks comment on whether there is a centralized eligibility database for WIC data, which is administered at the state level. The National Verifier also has a number of current CMAs with state agencies permitting access to USDA SNAP participant data in those states. How should USAC and the USDA incorporate these existing CMAs into the Memorandum of Understanding? With respect to the Department of Education, Pell Grant recipients will be eligible to enroll in the Affordable Connectivity Program but, for the EBB Program, applications based on Pell Grant participation are subject to manual review. An automated connection with the Department of Education for Pell Grant data would improve the enrollment experience of Pell Grant recipients. Are there any legal barriers or other challenges that would prevent CMA access to Pell Grant data? Finally, with respect to the Memorandum of Understanding with HHS, USAC and the HHS agency Centers for Medicare & Medicaid Services have a current CMA permitting data sharing to qualify Medicaid recipients nationwide for Lifeline and the EBB Program. The Bureau seeks comment on whether other agencies within HHS would have any data that would benefit applicants for the Affordable Connectivity and Lifeline programs.

126. The Bureau seeks comment on what considerations the Commission should include regarding the end of the Affordable Connectivity Program when the funding is fully expended. If establishing requirements for the sunset of the Affordable Connectivity Program, how can the Commission benefit from the rules already established for the wind-down of the EBB Program? The Bureau seeks comment on whether the Commission should delegate to the Bureau the responsibility for setting the requirements for the wind-down of the Affordable Connectivity Program. What notice requirements should the Commission consider for the wind-down? How much notice should the Commission give to providers and households regarding the end of the program? How much notice will participating providers require in order to give adequate notice to households? The Commission and USAC have developed a projection forecasting the termination of the EBB Program. How best can the Commission forecast the end of the Affordable Connectivity Program?

127. The Infrastructure Act leaves unchanged the requirement that the Commission adopt audit requirements to ensure that participating providers are in compliance with the program requirements and to prevent waste, fraud, and abuse. Moreover, within one year of the date of enactment of the Infrastructure Act, the Commission's Office of Inspector General shall conduct an audit of the disbursements to a representative sample of participating providers. As with the EBB Program, the Bureau proposes that the Commission delegate authority to the Office of Managing Director (OMD) to develop and implement an audit process of participating providers, for which it may obtain the assistance of third parties, including but not limited to USAC. Such audits would be in addition to any audits conducted by the Commission's Office of Inspector General. The Bureau seeks comment on the audit requirements and procedures to be used to test provider compliance with Affordable Connectivity Program rules, including whether ''spot checks'' of provider practices should be incorporated into those procedures. The Bureau also proposes adopting for the Affordable Connectivity Program the documentation retention requirements used in the EBB Program.

128. In the EBB Program, the Commission directed USAC to conduct program integrity reviews of oversubscribed addresses, of a sample of households qualifying based on a member of their household's enrollment in a CEP school, and a sample of households enrolled through an alternative verification process, in addition to other areas as determined by the Bureau and USAC to deter waste, fraud, and abuse in the Program. The Bureau proposes that USAC also develop a plan and conduct program integrity reviews, subject to OMD and Bureau approval, to determine provider and consumer compliance with ACP program rules. The Bureau seeks comment on the areas that might be most at risk for non-compliance that should be the subject of a program integrity review.

129. The Infrastructure Act leaves unchanged the declaration that a violation of section 904 or any regulation promulgated under that section ''shall be treated as violation of the Communications Act of 1934 or a regulation promulgated under such Act.'' The Commission is compelled to enforce the section of the Infrastructure Act establishing the Affordable Connectivity Program and associated regulations ''in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Communications Act of 1934 were incorporated or made a part of this section.'' The Commission in the *EBB Program Order* stated that it would use its existing statutorily permitted enforcement powers to conduct investigations and impose administrative forfeitures, and would apply the Commission's suspension and debarment rules applicable to USF participants to EBB Program providers. Moreover, as discussed in this document, the Infrastructure Act expressly granted the Commission the authority to impose forfeiture penalties to enforce compliance, and the Bureau proposes that the Commission use its existing, statutorily permitted enforcement powers to initiate investigations of program rule violations for the Affordable Connectivity Program. The Bureau repeats here its request for comment on this proposal. Additionally, the Commission currently has pending a suspension and debarment proceeding proposing rules that would be applicable to conduct under the USF programs, Telecommunications Relay Services and the National Deaf-Blind Equipment Distribution Program. The Bureau seeks comment on whether an extension of the suspension and debarment rules proposed in that proceeding (when finalized) to the Affordable Connectivity Program, as well as any ACP grant program for outreach partners, would be desirable to prevent waste, fraud, and abuse, and if so, what modifications (if any) of such proposed suspension and debarment rules should be considered for the grant program.

130. The Infrastructure Act leaves unchanged the safe harbor provision in the Consolidated Appropriated Act stating that the Commission may not enforce a violation of the Act using sections 501, 502, or 503 of the Communications Act, or any rules of the Commission promulgated under such sections, if a participating provider demonstrates that it relied in good faith

on information provided to such provider to make any verification required by section 904(b)(2). Section 904(b)(2) imposes a duty on providers to verify whether a household is eligible to receive discounted service and a connected device through the program, and the Commission in the *EBB Program Order* established that the safe harbor will apply to providers who use the National Verifier for eligibility determinations or any alternative verification process approved by the Commission. The Commission provided that the safe harbor applies to providers who act in good faith with respect to the eligibility verification processes and that the Commission has extensive experience evaluating the good faith actions of regulated entities. The Bureau proposes that the Commission adopt this application of the safe harbor adopted in the *EBB Program Order* to providers participating in the Affordable Connectivity Program and that providers that reasonably rely on documentation regarding eligibility determinations provided by eligible households or an eligibility determination from the National Verifier will be able to avail themselves of this statutory safe harbor with respect to their compliance with the Affordable Connectivity Program rules. The Bureau seeks comment on this proposal.

131. Section 904 of the Consolidated Appropriations Act, 2021, as amended by the Infrastructure Act, authorizes the Commission to use the services USAC to administer the Affordable Connectivity Fund, including developing and processing reimbursements and distributing funds to participating providers. Based on USAC's extensive experience administering both the Lifeline and EBB Programs, the Bureau proposes using USAC to administer the Affordable Connectivity Program. Given the challenging timeframe provided in the Act for the implementation of the Affordable Connectivity Program, the Bureau proposes that relying on USAC as the administrator would best facilitate the orderly implementation and administration of the Affordable Connectivity Program and would also minimize provider and consumer confusion. The Bureau seeks comment on the use of the USAC administered systems, including, but not limited to, the Lifeline National Verifier, National Lifeline Accountability Database, Representative Accountability Database, and the Lifeline Claims System for administering the Affordable Connectivity Program. The Bureau also seeks comment on using established USAC functions and processes for administering the Affordable Connectivity Program, including, but not limited to, call centers, provider and communications outreach and training, program integrity reviews, audits, assisting the Commission in conducting its review, and data services. The Bureau seeks comment on this proposal. In addition, how should the Commission measure USAC's performance in administering the Affordable Connectivity Program? What aspects of USAC's administration of the EBB Program were most effective from the perspective of the providers and applicants, and what aspects may need improvement going forward?

132. Given that the Affordable Connectivity Program is expected to be a longer-term program than the EBB Program, the Bureau proposes that the Commission require providers to submit to USAC annual officer certifications, under penalty of perjury, relating to the Affordable Connectivity Program. The Bureau further proposes that each officer must certify that the participating provider has policies and procedures in place to ensure compliance with ACP rules. The Bureau seeks comment on the contents of this certification and feedback on whether such certifications would help guard against waste, fraud, and abuse in the Affordable Connectivity Program. This practice is currently used across the Commission's Universal Service Fund programs through the use of FCC Form 481 that requires providers participating in High Cost and Lifeline to annually certify their compliance with those programs' rules. Pursuant to § 54.416 of the Commission's rules, ETCs must also certify to their compliance with Lifeline program rules and that ETCs have policies and procedures in place to ensure that their Lifeline subscribers are eligible for Lifeline service. The Bureau seeks comment on these ideas.

133. *Administrative Cap.* The Infrastructure Act continues to make available to the Commission no more than 2% of the Affordable Connectivity Fund (formerly called the Emergency Broadband Connectivity Fund) for the administration of the Affordable Connectivity Program. The Infrastructure Act further appropriates an additional $14.2 billion (in addition to the amounts previously appropriated under the Consolidated Appropriations Act, 2021) into the Affordable Connectivity Fund. Thus, the overall cap on administrative costs is $348 million (some of which has already been expended for the EBB Program). In the *EBB Program Order,* the Commission directed OMD and USAC to re-evaluate the program's budget to determine if any funds budgeted for administrative expenses should instead be used to fund reimbursements. Should the Commission similarly require a re-examination of the administrative funds and budget in the Affordable Connectivity Program to determine if any funds can be used for reimbursements? If so, at what intervals should the re-evaluation take place? In the *EBB Program Order,* the Commission also required that USAC regularly report to OMD USAC's program budget for the administration of the EBB Program. The Bureau proposes that the Commission require similar regular reporting from USAC on its projected budget for the administration of the Affordable Connectivity Program. The Bureau seeks comment on this proposal.

134. *Red Light and Do Not Pay.* To implement the requirements of the Debt Collection Improvement Act of 1996, the Commission has established what is commonly referred to as the red light rule. Under the red light rule, the Commission will not take action on applications or other requests by an entity that is found to owe debts to the Commission until that debt is fully paid or resolved. In the EBB Program, the Commission waived the red light rule given the limited duration and emergency nature of that Program. The red light rule is not waived for the Lifeline program or other longstanding programs such as the Telecommunications Relay Service. In contrast to the EBB Program, the Bureau proposes to apply the red light rule to the Affordable Connectivity Program and thus ACP providers would be subject to the red light rule. The Bureau seeks comment on this approach.

135. In the *EBB Program Order,* the Commission explained that pursuant to the requirements of the Payment Integrity Information Act of 2019 (PIIA), the Commission is required to ensure that a thorough review of available databases with relevant information on eligibility occurs to determine program or award eligibility and to prevent improper payments before the release of any federal funds. To that end, the Commission explained that to meet this requirement, the Commission will make use of the Do Not Pay system administered by the Department of Treasury's Bureau of the Fiscal Service and if a check of the system reveals that a provider cannot be paid, the Commission will withhold issuing commitments and payments to that provider. The Commission further explained that USAC may work with the EBB Program provider to give it an opportunity to resolve the listing in the

Do Not Pay system, however the provider will be responsible for working with the relevant agency to correct its information before payment can be made by the Commission. The Commission also noted that providers not registered in the System for Award Management (SAM) may elect to participate in the EBB Program, enroll eligible households and receive program commitments, but active SAM registration is required in order to receive payment. The Bureau seeks comment on the payment administration process used for the EBB Program and on providers' experiences with the payment process as may be relevant for the Affordable Connectivity Program.

136. In enacting the Affordable Connectivity Program, the Infrastructure Act did not make any substantive changes to section 904(f), which permits the Commission to apply rules contained in part 54 of the Commission's rules to the EBB Program. In addition to the specific instances identified in this document, the Bureau seeks comment on applying the regulations contained in subpart E of part 54 to the Affordable Connectivity Program, to the extent that those rules do not conflict with the Affordable Connectivity Program parameters established by the Infrastructure Act. For example, the Bureau seeks comment on what definitions in section 54.400 should also be applied the Affordable Connectivity Program. Should the Commission include subscriber eligibility determination and certification rules as found in section 54.410? The Bureau also seeks comment on whether regulations in subpart H of the Commission's rules, which pertain to USAC's functions as administrator of the USF, should be applied to the Affordable Connectivity Program. The Bureau proposes to apply sections 54.702(c) of the Commission's rules prohibiting USAC from making policy, interpreting unclear provisions of the statute or rules, or interpreting the intent of Congress. What other provisions of subpart H, would, if applied, facilitate the effective administration of the Affordable Connectivity Program? Alternatively, the Bureau seeks comment on whether the Commission should consider adopting distinct rules for the Affordable Connectivity Program rather than relying on definitions and processes from Lifeline-specific rules. What are the benefits of establishing ACP-specific rules rather than cross-referencing and relying on Lifeline rules? Finally, the Bureau urges commenters to provide feedback on the EBB Program and how the Commission can best use the experiences from the EBB Program to inform its rulemaking with respect to the Affordable Connectivity Program. The Bureau invites providers, consumer groups, EBB subscribers, other governmental agencies, non-profit organizations, and community institutions to share with us in this proceeding their experiences in navigating the EBB Program and what the Commission should consider when establishing rules for the Affordable Connectivity Program.

137. The Infrastructure Act does not modify section 904(h), which exempts the Commission from certain rulemaking requirements under the APA and the Paperwork Reduction Act (PRA). Because section 904(h) applies these exemptions to regulations promulgated to implement the EBB Program (*i.e.,* under section 904(c) of the Consolidated Appropriations Act), the Bureau understands these exemptions extend to the implementation of amendments that modify the EBB Program, with the possible exception of those consumer protection provisions for which the Infrastructure Act specifically requires the Commission to promulgate rules in accordance with the APA. Furthermore, the PRA in its ordinary operation includes statutory comment periods that encompass several months, which cannot be completed consistent with the deadlines in the Infrastructure Act. Exempting this rulemaking proceeding from the APA's rulemaking requirements is also essential for the timely promulgation of final rules in advance of the implementation and outreach efforts that will be required for the eventual launch of this new program. The Bureau seeks comment on these interpretations.

138. *Regulatory Flexibility Act.* The Regulatory Flexibility Act of 1980, as amended, requires that an agency prepare an initial regulatory flexibility analysis ''[w]henever an agency is required by [5 U.S.C. 553], or any other law, to publish general notice of proposed rulemaking for any proposed rule.'' Pursuant to the Consolidated Appropriations Act, as extended under the Infrastructure Act, section 553 generally does not apply to the rulemaking proceeding implementing the Affordable Connectivity Program. Furthermore, to the extent notice and comment under the APA is otherwise required for those consumer protection regulations that are required under section 904(b)(11), the Commission will either find good cause to dispense with such notice and comment or will subsequently issue a Notice of Proposed Rulemaking that will include an Initial Regulatory Flexibility Analysis. Accordingly, no Initial Regulatory Flexibility Analysis is required for in this Public Notice.

A. Paperwork Reduction Act

139. Pursuant to section 904(h)(2) of the Consolidated Appropriations Act, as extended under the Infrastructure Act, the collection of information sponsored or conducted under the rules proposed in this Public Notice is deemed not to constitute a collection of information for the purposes of the Paperwork Reduction Act, 44 U.S.C. 3501–3521.

140. The Commission, as part of its continuing effort to advance digital equity for all, including people of color, persons with disabilities, persons who live in rural or Tribal areas, and others who are or have been historically underserved, marginalized, or adversely affected by persistent poverty or inequality, invites comment on any equity-related considerations and benefits (if any) that may be associated with the proposals and issues discussed herein. Specifically, the Bureau seeks comment on how its proposals may promote or inhibit advances in diversity, equity, inclusion, and accessibility, as well the scope of the Commission's relevant legal authority.

Federal Communications Commission.

Cheryl Callahan,

Assistant Chief, Telecommunications Access Policy Division, Wireline Competition Bureau.

[FR Doc. 2021–27775 Filed 12–28–21; 8:45 am]

BILLING CODE 6712–01–P

Notices

Federal Register

Vol. 86, No. 247

Wednesday, December 29, 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

Food Safety and Inspection Service

[Docket Number FSIS–2021–0029]

2022 Rate Changes for the Basetime, Overtime, Holiday, Laboratory Services, and Export Application Fees

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice.

SUMMMARY: The Food Safety and Inspection Service (FSIS) is announcing the 2022 rates it will charge meat and poultry establishments, egg products plants, and importers and exporters for providing voluntary, overtime, and holiday inspection and identification, certification, and laboratory services. Additionally, FSIS is announcing that there will be no changes to the fee FSIS assesses to exporters that choose to apply for export certificates electronically through the export component of the Agency's Public Health Information System.

The new rates will be applied on January 2, 2022.

DATES: FSIS will charge the rates announced in this notice beginning January 2, 2022.

FOR FURTHER INFORMATION CONTACT: For further information contact Michael Toner, Director, Budget Division, Office of the Chief Financial Officer, FSIS, U.S. Department of Agriculture, Room 2159, South Building, 1400 Independence Avenue SW, Washington, DC 20250–3700; Telephone: (202) 690–8398, Fax: (202) 690–4155.

SUPPLEMENTARY INFORMATION:

Background

On April 12, 2011, FSIS published a final rule amending its regulations to establish formulas for calculating the rates it charges meat and poultry establishments, egg products plants, and importers and exporters for providing voluntary, overtime, and holiday inspection and identification, certification, and laboratory services (76 FR 20220).

In the final rule, FSIS stated that it would use the formulas to calculate the annual rates, publish the rates in **Federal Register** notices prior to the start of each calendar year, and apply the rates on the first FSIS pay period at the beginning of the calendar year. This notice provides the 2022 rates, which will be applied starting on January 2, 2022.

On September 6, 2017, FSIS published a **Federal Register** notice, ''Public Health Information System (PHIS) Export Component Country Implementation'' (FR 82 42056). The notice announced the delayed implementation of the export component to ensure sufficient testing and outreach to stakeholders and that the application fee would be recalculated based on available costs and number of applications, but would not be assessed prior to January 1, 2019. In addition, FSIS announced that it would implement the PHIS Export Component with a limited number of countries and gradually expand implementation to additional countries.

On April 29, 2019, FSIS published a **Federal Register** notice, ''Public Health Information System Export Component Fee'' (84 FR 17999). The notice announced that starting June 1, 2019, FSIS would assess a fee of $4.01 to exporters that chose to apply for export certificates electronically through the export component of PHIS. As noted below, that fee remains unchanged since 2019.

On July 15, 2021, FSIS published a **Federal Register** notice, ''Overtime and Holiday Inspection Fee Reductions for Small and Very Small Establishments'' (86 FR 37276). The noticed explained that the American Rescue Plan Act provided FSIS with $100 million in budget authority to reduce the costs of overtime inspection for small and very small official meat and poultry establishments and egg products plants. The notice also announced that FSIS implemented this provision by reducing overtime and holiday inspection fees for small establishments by 30 percent and very small establishments by 75 percent. More information on how to apply for the fee reduction is available at: *https://www.fsis.usda.gov/policy/federal-register-rulemaking/federal-register-notices/overtime-and-holiday-inspection-fee.*

2022 Rates and Calculations

The following table lists the 2022 Rates per hour, per employee, by type of service:

Service	2022 Rate (estimates rounded to reflect billable quarters)
Basetime	$67.00
Overtime	2.60
Holiday	98.20
Laboratory	85.72
Export Application	* 4.01

* Per application.

The regulations that cover these fees (other than the export application fee) state that FSIS will calculate the rates using formulas that include the Office of Field Operations (OFO) inspection program personnel's previous fiscal year's regular direct pay and regular hours (9 CFR 391.2, 391.3, 391.4, 590.126, 590.128, 592.510, 592.520, and 592.530).

FSIS determined the 2022 rates using the following calculations:

Basetime Rate = The quotient of dividing the Office of Field Operations (OFO) inspection program personnel's previous fiscal year's regular direct pay by the previous fiscal year's regular hours, plus the quotient multiplied by the calendar year's percentage of cost of living increase, plus the benefits rate, plus the travel and operating rate, plus the overhead rate, plus the allowance for bad debt rate.

The calculation for the 2022 basetime rate per hour per program employee is:

[FY 2021 OFO Regular Direct Pay divided by the previous fiscal year's Regular Hours ($456,808,446/15,032,156)] = $30.39 + ($30.39 * 2.7% (calendar year 2021 Cost of Living Increase)) = $31.21 + $11.86 (benefits rate) + $2.48 (travel and operating rate) + $21.45(overhead rate) + $0.00 (bad debt allowance rate) = $67.00, which is divisible by 4.

Overtime Rate = The quotient of dividing the Office of Field Operations (OFO) inspection program personnel's previous fiscal year's regular direct pay by the previous fiscal year's regular

hours, plus that quotient multiplied by the calendar year's percentage of cost of living increase, multiplied by 1.5 (for overtime), plus the benefits rate, plus the travel and operating rate, plus the overhead rate, plus the allowance for bad debt rate.

The calculation for the 2022 overtime rate per hour per program employee is:

[FY 2021 OFO Regular Direct Pay divided by previous fiscal year's Regular Hours ($456,808,446/15,032,156)] = $30.39 + ($30.39 * 2.7% (calendar year 2021 Cost of Living Increase)) = $31.21 * 1.5 = $46.82 + $11.86 (benefits rate) + $2.48 (travel and operating rate) + $21.45 (overhead rate) + $0.00 (bad debt allowance rate) = $82.61, rounded down to $82.60, so that it is divisible by 4.

Holiday Rate = The quotient of dividing the Office of Field Operations (OFO) inspection program personnel's previous fiscal year's regular direct pay by the previous fiscal year's regular hours, plus that quotient multiplied by the calendar year's percentage of cost of living increase, multiplied by 2 (for holiday pay), plus the benefits rate, plus the travel and operating rate, plus the overhead rate, plus the allowance for bad debt rate.

The calculation for the 2022 holiday rate per hour per program employee calculation is:

[FY 2021 OFO Regular Direct Pay divided by Regular Hours ($456,808,446/15,032,156)] = $30.39 + ($30.39 * 2.7% (calendar year 2021 Cost of Living Increase)) = $31.21* 2 = $62.42 + $11.86 (benefits rate) + $2.48 (travel and operating rate) + $21.45 (overhead rate) + $0.00 (bad debt allowance rate) = $98.21, rounded down to 98.20, so that it is divisible by 4.

Laboratory Services Rate = The quotient of dividing the Office of Public Health Science (OPHS) previous fiscal year's regular direct pay by the OPHS previous fiscal year's regular hours, plus the quotient multiplied by the calendar year's percentage cost of living increase, plus the benefits rate, plus the travel and operating rate, plus the overhead rate, plus the allowance for bad debt rate.

The calculation for the 2022 laboratory services rate per hour per program employee is:

[FY 2021 OPHS Regular Direct Pay/OPHS Regular hours ($25,641,975/527,590)] = $48.60 + ($48.60 * 2.7% (calendar year 2021 Cost of Living Increase)) = $49.91 + $11.86 (benefits rate) + $2.48 (travel and operating rate) + $21.45 (overhead rate) + $0.00 (bad debt allowance rate) = $85.71, rounded up to 85.72, so that it is divisible by 4.

Calculations for the Benefits, Travel and Operating, Overhead, and Allowance for Bad Debt Rates

These rates are components of the basetime, overtime, holiday, and laboratory services rates formulas.

Benefits Rate: The quotient of dividing the previous fiscal year's direct benefits costs by the previous fiscal year's total hours (regular, overtime, and holiday), plus that quotient multiplied by the calendar year's percentage cost of living increase. Some examples of direct benefits are health insurance, retirement, life insurance, and Thrift Savings Plan basic and matching contributions.

The calculation for the 2022 benefits rate per hour per program employee is:

[FY 2021 Direct Benefits/(Total Regular hours + Total Overtime hours + Total Holiday hours) ($214,717,112/18,590,355)] = $11.55 + ($11.55 * 2.7% (calendar year 2021 Cost of Living Increase)) = $11.86.

Travel and Operating Rate: The quotient of dividing the previous fiscal year's total direct travel and operating costs by the previous fiscal year's total hours (regular, overtime, and holiday), plus that quotient multiplied by the calendar year's percentage of inflation.

The calculation for the 2022 travel and operating rate per hour per program employee is:

[FY 2021 Total Direct Travel and Operating Costs/(Total Regular hours + Total Overtime hours + Total Holiday hours) ($45,098,829/18,590,355)] = $2.43 + ($2.43 * 2.1% (2022 Inflation) = $2.48.

Overhead Rate: The quotient of dividing the previous fiscal year's indirect costs plus the previous fiscal year's information technology (IT) costs in the Public Health Data Communication Infrastructure System Fund plus the provision for the operating balance less any Greenbook costs (*i.e.,* costs of USDA support services prorated to the service component for which fees are charged) that are not related to food inspection by the previous fiscal year's total hours (regular, overtime, and holiday) worked across all funds, plus the quotient multiplied by the calendar year's percentage of inflation.

The calculation for the 2022 overhead rate per hour per program employee is:

[FY 2021 Total Overhead/(Total Regular hours + Total Overtime hours + Total Holiday hours) ($ 390,615,397/18,590,355)] = $21.01 + ($21.01 * 2.1% (2021 Inflation) = $21.45.

Allowance for Bad Debt Rate = Previous fiscal year's total allowance for bad debt (for example, debt owed that is not paid in full by plants and establishments that declare bankruptcy) divided by previous fiscal year's total hours (regular, overtime, and holiday) worked.

The 2022 calculation for bad debt rate per hour per program employee is:

[FY 2021 Total Bad Debt/(Total Regular hours + Total Overtime hours + Total Holiday hours) = ($249,286/18,590,355)] = $0.01.

2022 Electronic Export Application Fee

The 2022 Electronic Export Application Fee:

$$\frac{\text{Labor Cost } (\$560{,}901.60 + (\$337{,}369)) + \text{IT Cost } (\$1{,}414{,}285.60 + \$0)}{576{,}192}$$

$$= \$4.01$$

As published in the 2016 final rule, the Electronic Export Application Fee Formula is:

Labor Cost (Technical Support + Export Library Maintenance) + IT Cost (Ongoing Operations and Maintenance + eAuthentication)

Number of Export Applications

FSIS stated in the 2016 final rule (81 FR 42225) and the 2017 **Federal Register** notice (FR 82 42056) that it would update and recalculate the fee based on the best available estimates for costs and number of applications; however, the number of export applications (the denominator in the formula) cannot be accurately assessed until a majority of countries are included in the export component. Therefore, because a majority of countries are not yet included in the PHIS Export component, the cost estimates and projected export applications in the final rule remain the best estimate for 2022, leaving the electronic export application fee unchanged.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, FSIS will announce this **Federal Register** publication on-line through the FSIS website located at: *https://www.fsis.usda.gov/policy/federal-register-rulemaking/federal-register-rules.* FSIS will also announce and provide a link to this **Federal Register** publication through the FSIS *Constituent Update,* which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to our constituents and stakeholders. The *Constituent Update* is available on the FSIS website. Through the website, FSIS can provide information to a much broader, more diverse audience. In addition, FSIS offers an email subscription service which provides automatic and customized access to selected food safety news and information. This service is available at: *https://www.fsis.usda.gov/subscribe.* Options range from recalls to export information, regulations, directives, and notices. Customers can add or delete subscriptions themselves and have the option to password protect their accounts.

USDA Non-Discrimination Statement

In accordance with Federal civil rights law and USDA civil rights regulations and policies, the USDA, its Agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Persons with disabilities who require alternative means of communication for program information (*e.g.,* Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA's TARGET Center at (202) 720–2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877–8339. Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD–3027, found online at How to File a Program Discrimination Complaint and at any USDA office or write a letter addressed to USDA and provide in the letter all of the information requested in the form. To request a copy of the complaint form, call (866) 632–9992. Submit your completed form or letter to USDA by: (1) Mail: USDA, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410; (2) fax: (202) 690–7442; or (3) email: *program.intake@usda.gov.* USDA is an equal opportunity provider, employer, and lender.

Paul Kiecker,

Administrator.

[FR Doc. 2021–28300 Filed 12–28–21; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Forest Service

Caribou-Targhee National Forest; Idaho and Wyoming; Withdrawal of Notice of Intent To Prepare a Supplemental Environmental Impact Statement for the Targhee Revised Forest Plan With Proposed Forest Plan Amendment

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Notice; withdrawal.

SUMMARY: The Caribou-Targhee National Forest is withdrawing the Notice of Intent (NOI) that was published in the **Federal Register** on October 29, 2010 (75(209):66719–66721) to prepare a Supplemental Environmental Impact Statement (SEIS) for a Forest Plan Amendment to the 1997 Revised Forest Plan for the Targhee National Forest.

FOR FURTHER INFORMATION CONTACT: Questions concerning this notice should be directed to: Robbert Mickelsen, Forest Planning Staff Officer, 1405 Hollipark Drive, Idaho Falls, Idaho 83401 or 208–206–3637.

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: A NOI to prepare a SEIS was first published in the **Federal Register** on May 28, 2008 (73(99):29480–29481) to Prepare a Supplemental Environmental Impact Statement for the Targhee Revised Forest Plan with Proposed Forest Plan Amendment and was revised on October 29, 2010 (75(209):66719–66721) to further develop the proposed action.

The Forest Supervisor in consultation with the Intermountain Regional Office has determined that the 2010 Proposed Forest Plan Amendment should be withdrawn due to changes that have occurred since the publication in the **Federal Register**. Specifically, the 2010 Proposed Forest Plan Amendment does not align with amendment procedures in the 2012 Planning Rule, revised Council on Environmental Quality regulations, and other new information

regarding population and habitat status for some wildlife species that affects the original proposal.

Dated: December 22, 2021.

Sandra Watts,

Acting Associate Deputy Chief, National Forest System.

[FR Doc. 2021–28302 Filed 12–28–21; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF COMMERCE

International Trade Administation

[A–570–073]

Common Alloy Aluminum Sheet From the People's Republic of China: Final Results of Antidumping Duty Administrative Review, Final Successor-In-Interest Determination, and Final Determination of No Shipments; 2018–2020

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) determines that certain companies under review sold common alloy aluminum sheet (aluminum sheet) from the People's Republic of China (China) at less than normal value during the period of review (POR) June 22, 2018, through January 31, 2020, and that certain other companies had no shipments of subject merchandise to the United States during the POR. Commerce also continues to make a successor-in-interest determination with respect to one company.

DATES: Applicable December 29, 2021.

FOR FURTHER INFORMATION CONTACT: Frank Schmitt or Fred Baker, AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–4880 or (202) 482–2924, respectively.

SUPPLEMENTARY INFORMATION:

Background

Commerce published the Preliminary Results of this administrative review on June 25, 2021.[1] We invited interested parties to comment on the Preliminary Results, and we received case briefs and rebuttal briefs from interested parties.[2] On October 14, 2021, we extended the deadline for these final results until December 22, 2021.[3] For a full summary of the events that occurred since Commerce published the *Preliminary Results*, see the Issues and Decision Memorandum.[4] Commerce conducted this review in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act).

Scope of the Order [5]

The merchandise covered by the Order is common alloy aluminum sheet from China. For a complete description of the scope of the Order, see the Issues and Decision Memorandum.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs filed by interested parties are addressed in the Issues and Decision Memorandum. A list of these issues is attached to this notice.[6] The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be found at *https://access.trade.gov/public/FRNoticesListLayout.aspx*.

Changes From the Preliminary Results

Based on our analysis of the record and the comments received from interested parties, we made certain changes to the margin calculation. For a discussion of these changes, see the Issues and Decision Memorandum.

Final Results of Successor-In-Interest Analysis

In the *Preliminary Results,* Commerce determined that Jiangsu Alcha Aluminum Group Co., Ltd., is the successor-in-interest to Jiangsu Alcha Aluminum Co., Ltd. (Jiangsu Alcha).[7] No party commented on this issue and we have not received any information to contradict our preliminary finding. Therefore, we continue to find that Jiangsu Alcha Aluminum Group Co., Ltd. is the successor-in-interest to Jiangsu Alcha. Moreover, because we find Jiangsu Alcha Aluminum Group Co., Ltd. to be the successor-in-interest to Jiangsu Alcha, we intend to assign to Jiangsu Alcha Aluminum Group Co., Ltd., the same antidumping cash deposit rate assigned to Jiangsu Alcha, for purposes of determining antidumping liability in this proceeding.

Final Determination of No Shipments

In the *Preliminary Results,* Commerce determined that Teknik Aluminyum Sanayi A.S. and Companhia Brasileira de Aluminio did not have shipments of subject merchandise to the United States during the POR.[8] As we received no information to contradict our preliminary determination of no shipments with respect to those companies, we continue to find that they made no shipments of subject merchandise to the United States during the POR. Accordingly, we will issue appropriate instructions for these two companies that are consistent with our ''automatic assessment'' clarification.[9]

Final Affiliation and Single Entity Determination

In the *Preliminary Results,* Commerce determined that Jiangsu Alcha, Alcha International Holdings Limited (Alcha International), and Baotou Alcha Aluminum Co., Ltd. (Baotou Alcha) are affiliated entities, pursuant to sections 771(33)(E), (F), and (G) of the Act,[10] and that Jiangsu Alcha and Baotou Alcha should be treated as a single entity,

[1] *See Common Alloy Aluminum Sheet from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Partial Recission of Antidumping Administrative Review, Preliminary Determination of No Shipments, and Preliminary Successor-In-Interest Determination; 2018–2020,* 86 FR 33640 (June 25, 2021) *(Preliminary Results)*, and accompanying Preliminary Decision Memorandum (PDM).

[2] *See Preliminary Results,* 86 FR at 33642; *see also* Alcha's Letter, ''Common Alloy Aluminum Sheet from the People's Republic of China: Case Brief,'' dated August 12, 2021; Domestic Industry's Letter, ''Domestic Industry's Case Brief,'' dated August 12, 2021; Alcha's Letter, ''Common Alloy Aluminum Sheet from the People's Republic of China: Rebuttal Brief,'' dated August 19, 2021; and Domestic Industry's Letter, ''Domestic Industry's Rebuttal Brief,'' dated August 19, 2021.

[3] *See* Memorandum, ''2018–2020 Administrative Review of the Antidumping Duty Order on Common Alloy Aluminum Sheet from the People's Republic of China: Extension of Deadline for Final Results,'' dated October 14, 2021.

[4] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Common Alloy Aluminum Sheet from the People's Republic of China; 2018–2020,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[5] *See Common Alloy Aluminum Sheet from the People's Republic of China: Antidumping Duty Order,* 84 FR 2813 (February 8, 2019) *(Order).*

[6] *See* Appendix.

[7] See Preliminary Results PDM at 7–8.

[8] See Preliminary Results, 86 FR at 33641.

[9] See Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties, 76 FR 65694 (October 24, 2011) (Assessment Notice); see also ''Assessment Rates'' section, below.

[10] See Preliminary Results, 86 FR at 33642; see also Preliminary Results PDM at 8; and Memorandum, ''Preliminary Affiliation and Collapsing Memorandum: Common Alloy Aluminum Sheet from China,'' dated June 21, 2021 (Preliminary Affiliation Memorandum). In the Preliminary Results, we inadvertently referred only to section 771(33)(F) of the Act; however, we find affiliation among these companies under sections 771(33)(E), (F), and (G) of the Act.

pursuant to 19 CFR 351.401(f)(1)–(2).[11] For these final results, we continue to find that Jiangsu Alcha, Alcha International, and Baotou Alcha are affiliated entities pursuant to section 771(33)(E), (F), and (G) of the Act, and we have revised our analysis to determine that all three companies should be treated as a single entity pursuant to 19 CFR 351.401(f)(1)–(2).[12]

Separate Rates

In the *Preliminary Results,* Commerce determined that Jiangsu Alcha, Alcha International, and Yinbang Clad Material Co., Ltd. (Yinbang Clad) are eligible for separate rates.[13] Commerce also preliminarily determined that Choil Aluminum Co., Ltd.; Jiangyin New Alumax Composite Material Co., Ltd. (Jiangyin New Alumax); Henan Mingtai Al Industrial Co., Ltd./Zhengzhou Mingtai Industry Co., Ltd. (collectively, Mingtai); PMS Metal Profil Aluminyum San. Ve Tic. A.S. Demirtas Organize Sanayi Bolgesi; and United Metal Coating LLC are not eligible for separate rates.[14] No party commented on this issue and we have not received any information to contradict our preliminary findings.

For these final results, taking into account the final single entity determination, we determine that the single entity of Jiangsu Alcha, Baotou Alcha, and Alcha International (collectively, Alcha) [15] is eligible for a separate rate, as is Yinbang Clad. Commerce continues to find that Choil Aluminum Co., Ltd.; Jiangyin New Alumax; Mingtai; PMS Metal Profil Aluminyum San. Ve Tic. A.S. Demirtas Organize Sanayi Bolgesi; and United Metal Coating LLC are not eligible for a separate rate.

Rate for Non-Examined Separate Rate Respondents

The statute and our regulations do not address the establishment of a rate to be assigned to respondents not selected for individual examination when we limit our examination of companies subject to the administrative review pursuant to section 777A(c)(2)(B) of the Act. Generally, we look to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation, for guidance when calculating the rate for respondents not individually examined in an administrative review. Under section 735(c)(5)(A) of the Act, the all-others rate is normally ''an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely {on the basis of facts available}.''

For these final results, we calculated a weighted-average dumping margin that is not zero, *de minimis,* or determined entirely on the basis of facts available for Alcha. Accordingly, consistent with our *Preliminary Results,* Commerce has assigned Yinbang Clad, a separate rate respondent that was not selected for individual examination, a margin of 56.93 percent, Alcha's calculated weighted-average dumping margin, for these final results.

The China-Wide Entity

Because no party requested a review of the China-wide entity in this segment of the proceeding, the entity is not under review, and the entity's rate (*i.e.,* 59.72 percent) is not subject to change.[16] Other than the companies for which we made a final no-shipment determination, and the companies for which Commerce rescinded the administrative review in the *Preliminary Results,* Commerce considers all other companies for which a review was requested and did not demonstrate separate rate eligibility, to be part of the China entity.[17]

Final Results of Administrative Review

For the companies subject to this administrative review which established their eligibility for a separate rate, Commerce determines that the following weighted-average dumping margins exist for the period June 22, 2018, through January 31, 2020:

Exporter	Weighted-average dumping margin (percent)
Jiangsu Alcha Aluminum Co., Ltd.[18]/Baotou Alcha Aluminum Co., Ltd./Alcha International Holdings Limited	56.93
Yinbang Clad Material Co., Ltd.	56.93

Disclosure

Commerce intends to disclose the calculations performed for these final results of review of the aluminum sheet from China antidumping duty order to interested parties within five days of the date of publication of this notice in the **Federal Register** , in accordance with 19 CFR 351.224(b).

Assessment Rates

Pursuant to section 751(a)(2)(C) of the Act and 19 CFR 351.212(b), Commerce has determined, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with these final results of review. We intend to issue assessment instructions to CBP no earlier than 35 days after the date of publication of these final results. 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).

Where Alcha reported reliable entered values, we calculated importer-(or customer-) specific ad valorem rates by aggregating the dumping margins calculated for all U.S. sales to each importer (or customer) and dividing this amount by the total entered value of the sales to each importer (or customer).[19] Where Commerce calculated a weighted-average dumping margin by dividing the total amount of dumping for reviewed sales to that party by the total sales quantity associated with those transactions, Commerce will direct CBP to assess importer-(or customer-) specific assessment rates

[11] See Preliminary Results, 86 FR at 33642; see also Preliminary Results PDM at 8. In the Preliminary Results, we inadvertently omitted Baotou Alcha from the rate chart with respect to the exporter listed as ''Jiangsu Alcha Aluminum Co., Ltd./Alcha International Holdings Limited,'' published in the **Federal Register**. See Preliminary Results, 86 FR at 33642. Based on our preliminary determination, Baotou Alcha should have been included in the rate chart with the aforementioned exporter and thus, we have corrected that omission in this notice.

[12] See Memorandum, ''Administrative Review of the Antidumping Duty Order on Common Alloy Aluminum Sheet from the People's Republic of China: Final Affiliation and Collapsing Memorandum,'' dated concurrently with this notice.

[13] See Preliminary Results, 86 FR at 33642; see also Preliminary Results PDM at 17.

[14] See Preliminary Results PDM at 17–18.

[15] In the Preliminary Results, we referred to Jiangsu Alcha and Alcha International, collectively, as Alcha Group. See Preliminary Results, 86 FR at 33642.

[16] See Order, 84 FR at 2814.

[17] In this review, we have determined that the following companies subject to the review are now part of the China-wide entity: (1) Choil Aluminum Co., Ltd.; (2) Mingtai; (3) Jiangyin New Alumax; (4) PMS Metal Profil Aluminyum San. Ve Tic. A.S. Demirtas Organize Sanayi Bolgesi; and (5) United Metal Coating LLC.

[18] For the purposes of this review, we have considered the names Jiangsu Alcha Aluminum Co., Ltd. and Jiangsu Alcha Aluminium Co., Ltd., as equivalent.

[19] See 19 CFR 351.212(b)(1).

based on the resulting per-unit rates.[20] Where an importer-(or customer-) specific ad valorem or per-unit rate is greater than *de minimis* (*i.e.,* 0.50 percent), Commerce will instruct CBP to collect the appropriate duties at the time of liquidation.[21] Where an importer-(or customer-) specific ad valorem or per-unit rate is zero or *de minimis,* Commerce will instruct CBP to liquidate appropriate entries without regard to antidumping duties.[22]

For the non-selected respondent that received a separate rate, Yinbang Clad, we will instruct CBP to apply an antidumping duty assessment rate of 56.93 percent to all entries of subject merchandise that entered the United States during the POR. For the companies that we determined had no reviewable entries of the subject merchandise in this review period, any suspended entries that entered under those exporters'' case numbers (*i.e.,* at the exporters'' rates) will be liquidated at the China-wide rate, *i.e.,* 59.72 percent.[23] For all other companies, we will instruct CBP to apply the antidumping duty assessment rate of the China-wide entity to all entries of subject merchandise exported by these companies.[24]

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this review for shipments of the subject merchandise from China entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act: (1) For subject merchandise exported by the companies listed above that have separate rates, the cash deposit rate will be the rate established in these final results of review for each exporter as listed above; (2) for previously investigated or reviewed Chinese and non-Chinese exporters not listed above that received a separate rate in a prior segment of this proceeding, except for the companies which lost their separate rate eligibility in this review, the cash deposit rate will continue to be the existing exporter-specific rate; (3) for all Chinese exporters of subject merchandise that have not been found to be entitled to a separate rate, or lost their separate rate eligibility in this review, the cash deposit rate will be that for the China-wide entity; and (4) for all non-Chinese exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the Chinese exporter that supplied that non-Chinese exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Reimbursement of Duties

This notice also serves as the final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during the POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification Regarding Administrative Protection Order

This notice also serves as the final reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. 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 regulation and terms of an APO is a sanctionable violation.

Notification to Interested Parties

These final results of review are issued and published in accordance with sections 751(a) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(5).

Dated: December 22, 2021.

Ryan Majerus,

Deputy Assistant Secretary for Policy and Negotiations, Performing the Non-Exclusive Functions and Duties of the Assistant Secretary for Enforcement and Compliance.

Appendix—List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Changes to the Preliminary Results
V. Discussion of the Issues
Comment 1: Selection of Surrogate Country
Comment 2: HTS Classification for Certain Material Inputs and By-Products
Comment 3: Surrogate Value Data Availability
Comment 4: Double Remedies Adjustment
Comment 5: Export Subsidies Adjustment
Comment 6: Double Counting Consumption of Aluminum Inputs
Comment 7: Sigma-Capped Distance
VI. Recommendation

[FR Doc. 2021–28316 Filed 12–28–21; 8:45 am]

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[20] Id.

[21] Id.

[22] See 19 CFR 351.106(c)(2).

[23] For a full discussion of this practice, see Assessment Notice.

[24] See Initiation of Antidumping and Countervailing Duty Administrative Reviews, 85 FR 19730, 19731 (April 8, 2020) (''All firms listed below that wish to qualify for separate rate status in the administrative reviews involving NME countries must complete, as appropriate, either a separate rate application or certification, as described below.'').

DEPARTMENT OF COMMERCE

International Trade Administration

Environmental Technologies Trade Advisory Committee

AGENCY: International Trade Administration, U.S. Department of Commerce.

ACTION: Notice of an Open Meeting of a Federal Advisory Committee.

SUMMARY: This notice sets forth the schedule and proposed topics for a meeting of the Environmental Technologies Trade Advisory Committee (ETTAC).

DATES: The meeting is scheduled for Tuesday, January 18, 2022, from 10:00 a.m. to 2:00 p.m. Eastern Standard Time (EST). The deadline for members of the public to register to participate, including requests to make comments during the meeting and for auxiliary aids, or to submit written comments for dissemination prior to the meeting, is 5:00 p.m. EST on Tuesday, January 11, 2022.

ADDRESSES: The meeting will be held virtually via Webex. Requests to register to participate (including to speak or for auxiliary aids) and any written comments should be submitted via email to Ms. Victoria Yue, Office of Energy & Environmental Industries, International Trade Administration, at *Victoria.yue@trade.gov.*

FOR FURTHER INFORMATION CONTACT: Ms. Victoria Yue, Office of Energy & Environmental Industries, International Trade Administration (Phone: 202–482–3492; email: *Victoria.yue@trade.gov*).

SUPPLEMENTARY INFORMATION: The meeting will take place on Tuesday, January 18, 2022, from 10:00 a.m. to 2:00 p.m. EST. The general meeting is open to the public and time will be permitted for public comment. Members of the public seeking to attend the meeting are required to register in advance. Those interested in attending must provide notification by Tuesday, January 11, 2022, at 5:00 p.m. EST, via the contact information provided above.

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to OEEI at *Victoria.Yue@trade.gov* or (202) 482–3492 no less than one week prior to the meeting. Requests received after this date will be accepted, but it may not be possible to accommodate them.

Written comments concerning ETTAC affairs are welcome any time before or after the meeting. To be considered during the meeting, written comments must be received by Tuesday, January 11, 2022, at 5:00 p.m. EST to ensure transmission to the members before the meeting. Minutes will be available within 30 days of this meeting.

Topics to be considered: During the January 18 meeting, which will be the fourth meeting of the current charter term, the Committee will review draft recommendations and conduct subcommittee breakouts under the themes of Trade Policy and Export Competitiveness, Climate Change Mitigation and Resilience Technologies, and Waste Management and Circular Economy. An agenda will be made available one week prior to the meeting upon request to Victoria Yue.

Background: The ETTAC is mandated by Section 2313(c) of the Export Enhancement Act of 1988, as amended, 15 U.S.C. 4728(c), to advise the Environmental Trade Working Group of the Trade Promotion Coordinating Committee, through the Secretary of Commerce, on the development and administration of programs to expand U.S. exports of environmental technologies, goods, services, and products. The ETTAC was most recently re-chartered through August 15, 2022.

Dated: December 22, 2021.

Jennifer Boger,

Director, Office of Health and Information Technologies, Industry & Analysis.

[FR Doc. 2021–28318 Filed 12–28–21; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from India: Notice of Second Amended Final Determination; Notice of Amended Order; Notice of Resumption of First and Reinitiation of Second Antidumping Duty Administrative Reviews; Notice of Opportunity for Withdrawal; and Notice of Assessment in Third Antidumping Duty Administrative Review

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: On August 31, 2021, the Court of Appeals for the Federal Circuit (CAFC) issued its final judgment in *Goodluck India Limited* v. *United States,* Consol. Court no. 2020–2017, reversing and remanding the August 13, 2019 decision of the Court of International Trade (CIT). On November 17, 2021, in accordance with the CAFC's decision, the CIT issued a final judgment vacating its August 13, 2019 opinion and sustained the Department of Commerce (Commerce)'s final determination in the less-than-fair-value (LTFV) investigation of certain cold-drawn mechanical tubing of carbon and alloy steel (cold-drawn mechanical tubing) from India. Therefore, Commerce is hereby reinstating the final determination from the LTFV investigation and antidumping duty order with respect to the dumping margin assigned to Goodluck India Limited (Goodluck). As a result, we are: (1) Revising the prior revocation of the order with respect to Goodluck; (2) resuming the discontinued first administrative review with respect to Goodluck; (3) reinitiating the second administrative review with respect to all entries produced and exported by Goodluck during the period of review (POR); and (4) directing U.S. Customs and Border Protection (CBP) to assess final antidumping duties on all entries produced and exported by Goodluck during the third administrative review POR.

DATES: Applicable September 10, 2021.

FOR FURTHER INFORMATION CONTACT: Nathan James, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–5305.

SUPPLEMENTARY INFORMATION:

Background

On April 16, 2018, Commerce published its Final Determination in the LTFV investigation of cold-drawn mechanical tubing from India.[1] In the *Final Determination,* Commerce applied a rate based on adverse facts available to Goodluck after finding that the company failed to accurately report product ''control numbers'' in its home market sales and cost of production databases.[2] Although Goodluck attempted to submit new databases at the start of Commerce's verification of Goodluck's questionnaire responses, Commerce declined to accept the revised information, determining that such a revision did not constitute a ''minor correction.'' [3] Therefore, Commerce assigned Goodluck a rate of 33.80 percent. On June 11, 2018, Commerce published its AD Order on cold-drawn mechanical tubing from India.[4]

Goodluck appealed Commerce's *Final Determination.* On August 13, 2019, the CIT remanded the *Final Determination* to Commerce and instructed Commerce to consider the revised databases provided by Goodluck.[5] On remand, and under respectful protest, Commerce issued its final results of redetermination in accordance with the Court's order, calculating an estimated weighted-average dumping margin of 0.00 percent for Goodluck.[6] In calculating the revised dumping margin for Goodluck, Commerce relied on the corrections provided by Goodluck. On April 30, 2020, the CIT sustained Commerce's Final Remand Redetermination.[7] On May 27, 2020, Commerce published the *Amended Final/Timken Notice* relating to the

[1] *See Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from India: Final Affirmative Determination of Sales at Less than Fair Value,* 83 FR 16296 (April 16, 2018) (*Final Determination*) and accompanying Issues and Decision Memorandum (IDM).

[2] *See* IDM at Comments 1 and 2.

[3] *Id.* at Comment 1.

[4] *See Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from the People's Republic of China, the Federal Republic of Germany, India, Italy, the Republic of Korea, and Switzerland: Antidumping Duty Orders; and Amended Final Determinations of Sales at Less Than Fair Value for the People's Republic of China and Switzerland,* 83 FR 26962 (June 11, 2018) (*AD Order*).

[5] *See Goodluck India Limited* v. *United States,* Court No. 18–00162, Slip Op. 19–110 (CIT August 13, 2019) (*Remand Order*).

[6] *See Final Results of Redetermination Pursuant to Court Remand, Goodluck India Limited* v. *United States,* Court No. 18–00162, Slip Op. 19–110, dated December, 23 2019 (*Final Redetermination*), available at *https://access.trade.gov/resources/remands/19-110.pdf.*

[7] *See Goodluck India Limited* v. *United States,* Court No. 18–00162, Slip Op. 20–57 (CIT April 30, 2020).

CIT's decision, in which we issued an amended final determination, and partially revoked the Order with respect to Goodluck.[8]

The petitioners[9] challenged the CIT's decision sustaining the Final Remand Redetermination and appealed the decision to the CAFC. On August 31, 2021, the CAFC reversed and remanded the CIT's decision affirming the Final Remand Redetermination.[10] Following the CAFC's decision, on November 17, 2021, the CIT subsequently vacated its *Remand Order* and sustained Commerce's original *Final Determination.*[11]

Amended Final Determination

Commerce is hereby revising the *Amended Final Determination,* which was issued pursuant to the CIT's now-vacated judgement in the *Amended Final/Timken Notice.* Consistent with Commerce's decision in the LTFV investigation, Commerce is revising the *Amended Final Determination* and assigning the following dumping margin to Goodluck:

Exporter	Estimated weighted-average dumping margin (percent)	Cash deposit rate (adjusted for offset(s)) (percent)
Goodluck India Limited	33.80	33.70

Amended Antidumping Duty Order

As a result of this amended final determination, in which Commerce assigned a dumping margin of 33.80 percent to Goodluck, Commerce is reinstating the *Order* with respect to Goodluck.

Resumption of Discontinued Antidumping Duty Administrative Reviews for Goodluck

In the *Amended Final/Timken Notice,* Commerce amended the final determination and AD Order in this proceeding and stated that ''{a}s a result of this amended final determination, in which Commerce has calculated an estimated weighted-average dumping margin of 0.00 percent for Goodluck, Commerce is hereby excluding merchandise produced and exported by Goodluck from the AD Order.''[12] As a result of the CIT's decision at that time, we discontinued the first administrative review with respect to Goodluck[13] and we did not conduct a review of entries both produced and exported by Goodluck in the second administrative review.[14]

However, as discussed above, the CAFC reversed the CIT's decision, and, as a result, Goodluck is now subject to the *AD Order.* Therefore, we are resuming the first administrative review with respect to Goodluck and are also reinitiating the second administrative review with respect to all entries produced and exported by Goodluck during the POR.[15] We will not revisit these reviews for any company other than Goodluck.

Given the unique circumstances at issue, Commerce is permitting parties an opportunity to withdraw their request(s) for either administrative review, if they wish to do so. Any such withdrawal requests must be submitted within 14 days of publication of this **Federal Register** notice on the record of the respective administrative review in ACCESS.[16] Parties are reminded that such requests are to be filed electronically using ACCESS and that electronically filed documents must be received successfully in their entirety by 5 p.m. Eastern Time on the due date. If all review requests are withdrawn for Goodluck for either administrative review, Commerce intends to issue a subsequent **Federal Register** notice rescinding the administrative review with respect to Goodluck and directing CBP to assess final antidumping duties at 33.70 percent, the cash deposit rate that would have prevailed in the absence of the now-vacated CIT decision.

Following the period for withdrawal of review requests, if there are any remaining review requests for Goodluck, Commerce will invite parties to provide comments relating to our approach in conducting these administrative reviews (including, for example, whether Goodluck should be treated as a mandatory respondent or a non-selected company). A memorandum outlining the timeline for comments will be placed on the records of each administrative review segment.

Notice of Assessment

Commerce did not receive a request for an administrative review of the antidumping duty order with respect to Goodluck for the period of June 1, 2020, through May 31, 2021, *i.e.,* the third administrative review. Therefore, in accordance with 19 CFR 351.212(c), we will instruct CBP to liquidate all entries for Goodluck and to assess antidumping duties on merchandise entered, or withdrawn from warehouse, for consumption at 33.70 percent, the cash deposit rate that would have prevailed in the absence of the now-vacated CIT decision.

Cash Deposit Requirements

Commerce will issue revised cash deposit instructions to CBP. Effective September 10, 2021, Goodluck's cash deposit rate will be 33.70 percent.

[8] *See Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel From India: Notice of Court Decision Not in Harmony With Final Determination of Sales at Less Than Fair Value; Notice of Amended Final Determination Pursuant to Court Decision; and Notice of Revocation of Antidumping Duty Order, in Part,* 85 FR 31742 (May 27, 2020) (*Amended Final/Timken Notice*).

[9] The petitioners are: ArcelorMittalTubular Products; Michigan Seamless Tube, LLC; Plymouth Tube Co., USA; PTC Alliance Corp.; Webco Industries, Inc.; and Zekelman Industries, Inc.

[10] *See Goodluck India Limited* v. *United States,* 11 F.4th 1335 (Fed. Cir. 2021) (*CAFC Goodluck Decision*).

[11] *See Goodluck India Limited* v. *United States,* Court No. 18–00162, ECF No. 74 (CIT November 17, 2021).

[12] *Timken Notice,* 85 FR 31742.

[13] *See Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from India: Preliminary Results of Antidumping Duty Administrative Review, Partial Rescission of Review, and Partial Discontinuation of Review; 2017–2019;* 85 FR 66930 (October 21, 2020).

[14] *See Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel From India: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2019–2020,* 86 FR 59982, 59984 (October 29, 2021).

[15] The first review covers the period November 22, 2017, through May 31, 2019. The second review covers the period June 1, 2019, through May 31, 2020. When Commerce previously conducted the second administrative review, we only examined entries of subject merchandise produced, but not exported by, Goodluck, and entries of subject merchandise exported, but not produced by, Goodluck. *Id.*

[16] ACCESS is Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System, and is available to registered users at *http://access.trade.gov.*

Notification to Interested Parties

This notice is issued and published in accordance with sections 516A(c) and (e) and 777(i)(1) of the Act.

Dated: December 21, 2021.

Ryan Majerus,

Deputy Assistant Secretary for Policy and Negotiations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2021–28269 Filed 12–28–21; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XB545]

Fisheries of the Exclusive Economic Zone off Alaska; North Pacific Halibut and Sablefish Individual Fishing Quota Cost Recovery Program

AGENCY: National Marine Fisheries Service (NMFS); National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of standard prices and fee percentage.

SUMMARY: NMFS publishes the individual fishing quota (IFQ) standard prices and fee percentage for cost recovery for the IFQ Program for the halibut and sablefish fisheries of the North Pacific (IFQ Program). The fee percentage for 2021 is 2.3 percent. This action is intended to provide holders of halibut and sablefish IFQ permits with the 2021 standard prices and fee percentage to calculate the required payment for IFQ cost recovery fees due by January 31, 2022.

DATES: The standard prices and fee percentages are valid on December 29, 2021.

FOR FURTHER INFORMATION CONTACT: Charmaine Weeks, Fee Coordinator, 907–586–7231.

SUPPLEMENTARY INFORMATION:

Background

NMFS Alaska Region administers the IFQ Program in the North Pacific. The IFQ Program is a limited access system authorized by the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and the Northern Pacific Halibut Act of 1982 (Halibut Act). Fishing under the IFQ Program began in March 1995. Regulations implementing the IFQ Program are set forth at 50 CFR part 679.

In 1996, the Magnuson-Stevens Act was amended to, among other purposes, require the Secretary of Commerce to ''collect a fee to recover the actual costs directly related to the management and enforcement of any . . . individual quota program.'' This requirement was further amended in 2006 to include collection of the actual costs of data collection and to replace the reference to ''individual quota program'' with a more general reference to ''limited access privilege program'' at § 304(d)(2)(A) of the Act. Section 304(d)(2) of the Magnuson-Stevens Act also specifies an upper limit on these fees, when the fees must be collected, and where the fees must be deposited.

On March 20, 2000, NMFS published regulations at § 679.45 to implement cost recovery for the IFQ Program (65 FR 14919). Under the regulations, an IFQ permit holder must pay a cost recovery fee for every pound of IFQ halibut and sablefish that is landed on their IFQ permit(s). The IFQ permit holder is responsible for self-collecting the fee for all IFQ halibut and sablefish landings on their permit(s). The IFQ permit holder is also responsible for submitting IFQ fee payments(s) to NMFS on or before January 31 of the year following the year in which the IFQ landings were made. The total dollar amount of the fee is determined by multiplying the NMFS published fee percentage by the ex-vessel value of all IFQ landings made on the permit(s) during the IFQ fishing year. As required by § 679.45(d)(1) and (d)(3)(i), NMFS publishes this notice of the fee percentage for the IFQ halibut and sablefish fisheries in the **Federal Register** during or prior to the last quarter of each year.

Standard Prices

The fee is based on the sum of all payments made to fishermen for the sale of the fish during the year. This includes any retro-payments (*e.g.,* bonuses, delayed partial payments, post-season payments) made to the IFQ permit holder for previously landed IFQ halibut or sablefish.

For purposes of calculating IFQ cost recovery fees, NMFS distinguishes between two types of ex-vessel value: Actual and standard. Actual ex-vessel value is the amount of all compensation, monetary or non-monetary, that an IFQ permit holder received as payment for his or her IFQ fish sold. Standard ex-vessel value is the default value used to calculate the fee. IFQ permit holders have the option of using actual ex-vessel value if they can satisfactorily document it; otherwise, the standard ex-vessel value is used.

Section 679.45(b)(3)(iii) requires the Regional Administrator to publish IFQ standard prices during the last quarter of each calendar year. These standard prices are used, along with estimates of IFQ halibut and IFQ sablefish landings, to calculate standard ex-vessel values. The standard prices are described in U.S. dollars per IFQ equivalent pound for IFQ halibut and IFQ sablefish landings made during the year. According to § 679.2, IFQ equivalent pound(s) means the weight amount, recorded in pounds, and calculated as round weight for sablefish and headed and gutted weight for halibut, for an IFQ landing. The weight of halibut in pounds landed as guided angler fish is converted to IFQ equivalent pound(s) as specified in § 300.65(c)(5)(ii)(E). NMFS calculates the standard prices to closely reflect the variations in the actual ex-vessel values of IFQ halibut and IFQ sablefish landings by month and port or port-group. The standard prices for IFQ halibut and IFQ sablefish are listed in the tables that follow the next section. Data from ports are combined as necessary to protect confidentiality.

Fee Percentage

NMFS calculates the fee percentage each year according to the factors and methods described at § 679.45(d)(2). NMFS determines the fee percentage that applies to landings made in the previous year by dividing the total costs directly related to the management, data collection, and enforcement of the IFQ Program (management costs) during the previous year by the total standard ex-vessel value of halibut and sablefish IFQ landings made during the previous year (fishery value). NMFS captures the actual management costs associated with certain management, data collection, and enforcement functions through an established accounting system that allows staff to track labor, travel, contracts, rent, and procurement. NMFS calculates the fishery value as described under the section Standard Prices.

Using the fee percentage formula described above, the percentage of management costs to fishery value for the 2021 calendar year is 2.3 percent of the standard ex-vessel value. An IFQ permit holder is to use the fee percentage of 2.3 percent to calculate their fee for IFQ equivalent pound(s) landed during the 2021 halibut and sablefish IFQ fishing season. An IFQ permit holder is responsible for submitting the 2021 IFQ fee payment to NMFS on or before January 31, 2022. Payment must be made in accordance with the payment methods set forth in § 679.45(a)(4)(iv). Payment can be made using credit card, debit card, or electronic check via the *pay.gov* program. NMFS does not accept credit

card information by phone or in-person for fee payments.

The 2021 fee percentage of 2.3 percent is less than the 2020 fee percentage of 3.0 percent (85 FR 82442, December 18, 2020). Between 2020 and 2021 there was a net decrease in management costs and a net increase in fishery value. Management costs decreased by approximately 10 percent while fishery value increased by approximately 66 percent. The net increase in value was due to higher ex-vessel prices and landings for both halibut and sablefish IFQ fisheries.

TABLE 1—REGISTERED BUYER STANDARD EX-VESSEL PRICES BY LANDING LOCATION FOR THE 2021 IFQ SEASON [1]

Landing location	Period ending	Halibut standard EX vessel price	Sablefish standard EX vessel price
HOMER			
	March 31	5.73	
	April 30	5.99	1.95
	May 31	6.07	1.89
	June 30	6.73	1.82
	July 31	7.70	1.84
	August 31	6.97	1.70
	September 30	7.20	2.19
	October 31	7.20	2.19
	November 30	7.20	2.19
	December 31	7.20	2.19
KETCHIKAN			
	March 31.		
	April 30	5.84	
	May 31	6.18	
	June 30	6.10	
	July 31.		
	August 31.		
	September 30	6.78	
	October 31	6.78	
	November 30	6.78	
	December 31	6.78	
KODIAK			
	March 31	5.28	
	April 30	5.49	1.55
	May 31	5.68	1.60
	June 30	6.03	1.76
	July 31	6.28	1.92
	August 31	6.32	1.78
	September 30	6.48	1.88
	October 31	6.48	1.88
	November 30	6.48	1.88
	December 31	6.48	1.88
PETERSBURG			
	March 31.		
	April 30	5.66	
	May 31	5.77	
	June 30	6.40	
	July 31	6.63	
	August 31	6.59	
	September 30	6.84	
	October 31	6.84	
	November 30	6.84	
	December 31	6.84	
SEWARD			
	March 31		1.76
	April 30	6.03	1.58
	May 31	6.09	1.68
	June 30.		
	July 31	7.32	
	August 31.		
	September 30.		
	October 31.		
	November 30.		
	December 31.		
SITKA			
	March 31	5.59	2.02
	April 30	5.77	2.08
	May 31	5.62	2.24
	June 30	6.07	2.33
	July 31	6.74	
	August 31	6.50	2.01
	September 30	6.65	2.26
	October 31	6.65	2.26

TABLE 1—REGISTERED BUYER STANDARD EX-VESSEL PRICES BY LANDING LOCATION FOR THE 2021 IFQ SEASON [1]—Continued

Landing location	Period ending	Halibut standard EX vessel price	Sablefish standard EX vessel price
	November 30	6.65	2.26
	December 31	6.65	2.26
PORT GROUP BERING SEA [2]			
	March 31.		
	April 30.		
	May 31	5.02	1.77
	June 30	5.35	1.70
	July 31	5.56	1.57
	August 31	5.79	2.00
	September 30	5.96	1.85
	October 31	5.96	1.85
	November 30	5.96	1.85
	December 31	5.96	1.85
PORT GROUP CENTRAL GOA [3]			
	March 31	5.64	1.68
	April 30	5.89	1.54
	May 31	5.95	1.63
	June 30	6.38	1.75
	July 31	7.25	1.79
	August 31	6.85	2.07
	September 30	7.20	1.92
	October 31	7.20	1.92
	November 30	7.20	1.92
	December 31	7.20	1.92
PORT GROUP SE ALASKA [4]			
	March 31	5.65	2.01
	April 30	5.79	1.88
	May 31	5.80	2.07
	June 30	6.12	2.08
	July 31	6.69	1.99
	August 31	6.60	1.98
	September 30	6.73	2.19
	October 31	6.73	2.19
	November 30	6.73	2.19
	December 31	6.73	2.19
ALL–ALASKA [5]			
	March 31	5.64	1.95
	April 30	5.83	1.68
	May 31	5.82	1.78
	June 30	6.17	1.84
	July 31	6.59	1.78
	August 31	6.48	2.03
	September 30	6.86	2.03
	October 31	6.86	2.03
	November 30	6.86	2.03
	December 31	6.86	2.03
ALL [5]			
	March 31	5.64	1.95
	April 30	5.83	1.68
	May 31	5.82	1.78
	June 30	6.17	1.84
	July 31	6.59	1.78
	August 31	6.51	2.03
	September 30	6.86	2.03
	October 31	6.86	2.03
	November 30	6.86	2.03
	December 31	6.86	2.03

1. **Note:** In many instances, prices are not shown in order to comply with confidentiality guidelines when there are fewer than three processors operating in a location during a month. Additionally, landings at different harbors in the same general location (*e.g.,* ''Juneau, Douglas, and Auke Bay'') have been combined to report landings to the main port (*e.g.,* ''Juneau'').

2. *Landing Locations Within Port Group—Bering Sea:* Akutan, Dillingham, Dutch Harbor/Unalaska, King Cove, King Salmon, Naknek, Nome, Savoonga, St. Lawrence Island, St. Paul, Togiak.

3. *Landing Locations Within Port Group—Central Gulf of Alaska:* Alitak, Cordova, Homer, Kenai, Kodiak, Sand Point, Seward, Valdez, Whittier.

4. *Landing Locations Within Port Group—Southeast Alaska:* Craig, Elfin Cove, Haines, Hoonah, Juneau, Kake, Ketchikan, Pelican, Petersburg, Port Alexander, Sitka, Wrangell, Yakutat.

5. *Landing Locations Within Port Group—All:* For Alaska: All landing locations included in 2, 3, and 4. For Washington: Bellingham, Seattle.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 23, 2021.

Peter Cooper,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2021–28292 Filed 12–28–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID: 0648–XB682]

Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council will conduct two informational meetings regarding Atlantic mackerel rebuilding.

DATES: The meetings will be held on Tuesday, January 11, 2022 and Wednesday, January 12, 2022 both starting at 7 p.m. and concluding by 9 p.m. See **SUPPLEMENTARY INFORMATION** for agenda details.

ADDRESSES: The meeting will take place over webinar using the Webex platform. Details on how to connect to the webinar by computer and/or telephone will be available at: *www.mafmc.org.*

Council address: Mid-Atlantic Fishery Management Council, 800 N State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331; website: *www.mafmc.org.*

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, telephone: (302) 526–5255.

SUPPLEMENTARY INFORMATION: Due to the continued poor condition of the Atlantic mackerel stock as determined by a 2021 management track stock assessment (*https://www.mafmc.org/s/c_2021-Atlantic-Mackerel-MT-assessment-report.pdf*), the MAFMC is revising the rebuilding plan for Atlantic mackerel. Additional commercial and recreational management measures are being considered. These meetings will review the stock assessment, expected quotas for upcoming years, and potential management measures. Public comment is invited, and will be used to inform the development of management measures. Final action by the MAFMC is expected in June 2022, and additional meetings and hearings are planned before final action (and will be noticed separately).

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to Shelley Spedden, (302) 526–5251, at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 22, 2021.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2021–28233 Filed 12–28–21; 8:45 am]

BILLING CODE 3510–22–P

COMMODITY FUTURES TRADING COMMISSION

Agency Information Collection Activities Under OMB Review

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (PRA), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Information and Regulatory Affairs (OIRA), of the Office of Management and Budget (OMB), for review and comment. The ICR describes the nature of the information collection and its expected costs and burden.

DATES: Comments must be submitted on or before January 28, 2022.

ADDRESSES: Written comments and recommendations for the proposed information collection should be submitted within 30 days of this notice's publication to OIRA, at *https://www.reginfo.gov/public/do/PRAMain.* Please find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the website's search function. Comments can be entered electronically by clicking on the ''comment'' button next to the information collection on the ''OIRA Information Collections Under Review'' page, or the ''View ICR—Agency Submission'' page. A copy of the supporting statement for the collection of information discussed herein may be obtained by visiting *https://www.reginfo.gov/public/do/PRAMain.*

In addition to the submission of comments to *https://Reginfo.gov* as indicated above, a copy of all comments submitted to OIRA may also be submitted to the Commodity Futures Trading Commission (the ''Commission'' or ''CFTC'') by clicking on the ''Submit Comment'' box next to the descriptive entry for OMB Control No. 3038–0043, at *https://comments.cftc.gov/FederalRegister/PublicInfo.aspx.*

Or by either of the following methods:

- *Mail:* Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.
- *Hand Delivery/Courier:* Same as Mail above.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments submitted to the Commission should include only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission's regulations.[1] The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from *https://www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the ICR will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: Melissa Chiang, Senior Assistant General Counsel, Legal Division, Commodity Futures Trading Commission, (202) 418–5578; email: *mchiang@cftc.gov,* and refer to OMB Control No. 3038–0043.

SUPPLEMENTARY INFORMATION:

Title: Rules Relating to Review of National Futures Association Decisions in Disciplinary, Membership Denial, Registration, and Member Responsibility Actions (OMB Control Number 3038–0043). This is a request for extension of a currently approved information collection.

Abstract: 17 CFR part 171 rules require a registered futures association to provide fair and orderly procedures for membership and disciplinary

[1] 17 CFR 145.9.

actions. The Commission's review of decisions of registered futures associations in disciplinary, membership denial, registration, and member responsibility actions is governed by Section 17(h)(2) of the Commodity Exchange Act, 7 U.S.C. 21(h)(2). The rules establish procedures and standards for Commission review of such actions, and the reporting requirements included in the procedural rules are either directly required by Section 17 of the Commodity Exchange Act or are necessary to the type of appellate review role Congress intended the Commission to undertake when it adopted that provision. Because the number of respondents, responses per respondent, and time per response has not changed, this renewal does not change the reporting burden for this collection.

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. On October 28, 2021, the Commission published in the Federal Register notice of the proposed extension of this information collection and provided 60 days for public comment on the proposed extension, 86 FR 59697 (''60-Day Notice'') The Commission did not receive any relevant comments on the 60-Day Notice.

Burden Statement: The estimated total annual respondent burden for this collection is three hours. This estimate includes the time needed to transmit decisions of disciplinary, membership denial, registration, and member responsibility actions to the Commission for review.

Estimated Number of Respondents: 1.

E*stimated Average Burden Hour(s) per Response:* 1 hour.

Estimated Number of Annual Responses per Respondent: 3.

Estimated Total Annual Burden Hours: 3 hours.

Frequency of Collection: On occasion.

There are no capital costs or operating and maintenance costs associated with this collection.

(Authority: 44 U.S.C. 3501 *et seq.*)

Dated: December 23, 2021.

Robert Sidman,

Deputy Secretary of the Commission.

[FR Doc. 2021–28293 Filed 12–28–21; 8:45 am]

BILLING CODE 6351–01–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

[Docket No. CFPB–2021–0023]

Agency Information Collection Activities: Comment Request

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice and request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the Bureau of Consumer Financial Protection (Bureau) is publishing this notice seeking comment on a Generic Information Collection titled, ''The Effect of Different Savings Elicitation Strategies on Emergency Savings Targets,'' prior to requesting the Office of Management and Budget's (OMB's) approval of this collection under the Generic Information Collection ''Generic Information Collection Plan for Studies of Consumers using Controlled Trials in Field and Economic Laboratory Settings'' under OMB Control number 3170–0048.

DATES: Written comments are encouraged and must be received on or before December 29, 2021 to be assured of consideration.

ADDRESSES: You may submit comments, identified by the title of the information collection, OMB Control Number (see below), and docket number (see above), by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: PRA_Comments@cfpb.gov.* Include Docket No. CFPB–2021–0023 in the subject line of the email.
- *Mail/Hand Delivery/Courier:* Comment intake, Bureau of Consumer Financial Protection (Attention: PRA Office), 1700 G Street NW, Washington, DC 20552.

Please note that due to circumstances associated with the COVID–19 pandemic, the Bureau discourages the submission of comments by mail, hand delivery, or courier. Please note that comments submitted after the comment period will not be accepted. In general, all comments received will become public records, including any personal information provided. Sensitive personal information, such as account numbers or Social Security numbers, should not be included.

FOR FURTHER INFORMATION CONTACT: Documentation prepared in support of this information collection request is available at www.regulations.gov. Requests for additional information should be directed to Anthony May, PRA Officer, at (202) 435–7278, or email: CFPB_PRA@cfpb.gov. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.* Please do not submit comments to these email boxes.

SUPPLEMENTARY INFORMATION:

Title of Collection: The Effect of Different Savings Elicitation Strategies on Emergency Savings Targets.

OMB Control Number: 3170–0048.

Type of Review: Request for approval of a generic information collection under an existing Generic Information Collection Plan.

Affected Public: Individuals.

Estimated Number of Respondents: 6,000.

Estimated Total Annual Burden Hours: 3,000.

Abstract: This project examines how the framing of savings plans can help consumers establish emergency savings. The Bureau plans to test whether asking consumers to think about opportunity costs for their money helps them save more effectively for emergencies. Our findings can inform Bureau-developed content aimed at helping Americans be better prepared for emergencies. The Bureau will conduct several studies as part of this project asking participants about their savings goals. Each study will involve unique participants. We expect to recruit about 6,000 participants across the life of the project. The Bureau will not receive any personally identifying information (PII). Any PII will be scrubbed by the contractor. We will collect demographics, psychological measures around savings, and consumers'' savings goals.

Request for Comments: The Bureau is publishing this notice and soliciting comments on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (b) The accuracy of the Bureau's estimate of the burden of the collection of information, including the validity of the methods and the assumptions used; (c) Ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Comments submitted in response to this notice will be submitted to OMB as part of its review of this

request. All comments will become a matter of public record.

Anthony May,

Paperwork Reduction Act Officer, Bureau of Consumer Financial Protection.

[FR Doc. 2021–28319 Filed 12–28–21; 8:45 am]

BILLING CODE 4810–AM–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: PR22–14–000.
Applicants: DTE Gas Company.
Description: Submits tariff filing per 284.123(b),(e)/: Revisions to Operating Conditions for Interstate Transportation Service to be effective 1/1/2022.
Filed Date: 12/21/2021.
Accession Number: 20211221–5093.
Comments/Protests Due: 5 p.m. ET 1/11/22.

Docket Numbers: RP22–432–000.
Applicants: Great Basin Gas Transmission Company.
Description: § 4(d) Rate Filing: Gas Quality Specifications to be effective 2/1/2022.
Filed Date: 12/21/21.
Accession Number: 20211221–5094.
Comment Date: 5 p.m. ET 1/3/22.

Docket Numbers: RP22–433–000.
Applicants: Range Resources—Appalachia, LLC, and Columbia Gulf Transmission, LLC v. Texas Eastern Transmission, LP.
Description: Joint Complaint of Range Resources—Appalachia, LLC, and Columbia Gulf Transmission, LLC.
Filed Date: 12/21/21.
Accession Number: 20211221–5128.
Comment Date: 5 p.m. ET 1/3/22.

Docket Numbers: RP22–434–000.
Applicants: Transcontinental Gas Pipe Line Company, LLC.
Description: § 4(d) Rate Filing: Negotiated Rates—Leidy South—Interim Svc Termin—Seneca Resources to be effective 12/19/2021.
Filed Date: 12/21/21.
Accession Number: 20211221–5136.
Comment Date: 5 p.m. ET 1/3/22.

Docket Numbers: RP22–435–000.
Applicants: Range Resources—Appalachia, LLC v. Texas Eastern Transmission, LP.
Description: Complaint of Range Resources—Appalachia, LLC v. Texas Eastern Transmission, LP requesting action to require Texas Eastern to modify or upgrade its system operations et. al.
Filed Date: 12/21/21.
Accession Number: 20211221–5269.
Comment Date: 5 p.m. ET 1/3/22.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

The filings are accessible in the Commission's eLibrary system by clicking on the links or 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: *https://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: December 22, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–28291 Filed 12–28–21; 8:45 am]

BILLING CODE 6717–01–P793

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2362–044]

Allete, Inc.; Notice of Application Tendered for Filing With the Commission and Establishing Procedural Schedule for Licensing and Deadline for Submission of Final Amendments

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. *Project No.:* 2362–044.

c. *Date filed:* December 20, 2021.

d. *Applicant:* Allete, Inc. (Allete).

e. *Name of Project:* Grand Rapids Hydroelectric Project (Grand Rapids Project).

f. *Location:* On the Mississippi River near the City of Grand Rapids in Itasca County, Minnesota. The project does not include any federal lands.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. David R. Moeller, Senior Attorney & Director of Regulatory Compliance, ALLETE, Inc., d.b.a. Minnesota Power, 30 West Superior Street, Duluth, MN 55802, 218–723–3963, *dmoeller@allete.com.*

i. *FERC Contact:* Laura Washington (202) 502–6072, *Laura.Washington@ferc.gov.*

j. This application is not ready for environmental analysis at this time.

k. *The Grand Rapids Project consists of the following existing facilities:* (1) 465-acre reservoir; (2) a concrete dam; (3) and a 425-foot-long, 2.4-kilovolt transmission line extending from the powerhouse to the non-project Blandin Paper Mill; and (4) a powerhouse containing two generating units with a total installed capacity of 2.1 megawatts.

The Grand Rapids Project is currently operated in a run-of-river mode and generates an annual average of approximately 6,424,000 kilowatt hours. Allete proposes to continue operating the project as a run-of-river facility and does not propose any new construction to the project.

l. A copy of the application can 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. 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 on March 13, 2020. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or (202) 502–8659 (TTY).

m. 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, contact FERC Online Support.

n. *Procedural schedule:* The application will be processed according to the following preliminary schedule. Revisions to the schedule will be made as appropriate.

Milestone	Target date
Issue Deficiency Letter (if necessary).	January 2022.
Request Additional Information.	February 2022.
Notice of Acceptance/Notice of Ready for Environmental Analysis.	June 2022.

o. Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of the notice of ready for environmental analysis.

Dated: December 22, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–28296 Filed 12–28–21; 8:45 am]

BILLING CODE 6717–01–P1065

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC21–125–000; EC21–128–000.

Applicants: PSEG Fossil LLC, PSEG Fossil Sewaren Urban Renewal LLC, PSEG Keys Energy Center LLC, PSEG Energy Resources & Trade LLC, Parkway Generation, LLC, Parkway Generation Essex, LLC, PSEG New Haven LLC, PSEG Power Connecticut LLC, PSEG Power New York LLC, Generation Bridge II, LLC.

Description: Response to December 6, 2021 Deficiency Letter of PSEG New Haven LLC, et al.

Filed Date: 12/17/21.

Accession Number: 20211217–5420.

Comment Date: 5 p.m. ET 1/7/22.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG22–32–000.

Applicants: Flower Valley II LLC.

Description: Self-Certification of Exempt Wholesale Generator Status of Flower Valley II LLC.

Filed Date: 12/21/21.

Accession Number: 20211221–5203.

Comment Date: 5 p.m. ET 1/11/22.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–3079–019.

Applicants: Tyr Energy LLC.

Description: Updated Market Power Analysis for Southwest Power Pool Inc. Region of Tyr Energy LLC.

Filed Date: 12/22/21.

Accession Number: 20211222–5161.

Comment Date: 5 p.m. ET 2/21/22.

Docket Numbers: ER15–1873–013.

Applicants: Buckeye Wind Energy LLC.

Description: Triennial Market Power Analysis for Southwest Power Pool Inc. Region of Buckeye Wind Energy LLC.

Filed Date: 12/21/21.

Accession Number: 20211221–5218.

Comment Date: 5 p.m. ET 2/21/22.

Docket Numbers: ER16–1720–019.

Applicants: Invenergy Energy Management LLC.

Description: Triennial Market Power Analysis for Southwest Power Pool Inc. Region of Invenergy Energy Management LLC.

Filed Date: 12/21/21.

Accession Number: 20211221–5216.

Comment Date: 5 p.m. ET 2/21/22.

Docket Numbers: ER18–1639–014.

Applicants: Constellation Mystic Power, LLC.

Description: Compliance filing: Sixth Compliance Filing to be effective 6/1/2022.

Filed Date: 12/20/21.

Accession Number: 20211220–5218.

Comment Date: 5 p.m. ET 1/10/22.

Docket Numbers: ER18–471–007; ER18–472–007.

Applicants: States Edge Wind I Holdings LLC, States Edge Wind I LLC.

Description: Triennial Market Power Analysis for Southwest Power Pool Inc. Region of States Edge Wind I LLC.

Filed Date: 12/21/21.

Accession Number: 20211221–5219.

Comment Date: 5 p.m. ET 2/21/22.

Docket Numbers: ER18–784–005.

Applicants: Upstream Wind Energy LLC.

Description: Triennial Market Power Analysis for Southwest Power Pool Inc. Region of Upstream Wind Energy LLC.

Filed Date: 12/22/21.

Accession Number: 20211222–5159.

Comment Date: 5 p.m. ET 2/21/22.

Docket Numbers: ER20–387–003.

Applicants: Traverse Wind Energy LLC.

Description: Triennial Market Power Analysis for Southwest Power Pool Inc. Region of Traverse Wind Energy LLC.

Filed Date: 12/21/21.

Accession Number: 20211221–5267.

Comment Date: 5 p.m. ET 2/21/22.

Docket Numbers: ER20–388–003.

Applicants: Traverse Wind Energy Holdings LLC.

Description: Triennial Market Power Analysis for Southwest Power Pool Inc. Region of Traverse Wind Energy Holdings LLC.

Filed Date: 12/21/21.

Accession Number: 20211221–5268.

Comment Date: 5 p.m. ET 2/21/22.

Docket Numbers: ER20–956–002.

Applicants: Thunderhead Wind Energy LLC.

Description: Triennial Market Power Analysis for Southwest Power Pool Inc. Region of Thunderhead Wind Energy LLC.

Filed Date: 12/21/21.

Accession Number: 20211221–5266.

Comment Date: 5 p.m. ET 2/21/22.

Docket Numbers: ER21–2137–002.

Applicants: IR Energy Management LLC.

Description: Triennial Market Power Analysis for Southwest Power Pool Inc. Region of IR Energy Management LLC.

Filed Date: 12/21/21.

Accession Number: 20211221–5217.

Comment Date: 5 p.m. ET 2/21/22.

Docket Numbers: ER21–2600–002.

Applicants: Southwest Power Pool, Inc.

Description: Compliance filing: Compliance Filing in Response to Order issued in ER21–2600 (L and O) to be effective 12/1/2021.

Filed Date: 12/22/21.

Accession Number: 20211222–5043.

Comment Date: 5 p.m. ET 1/12/22.

Docket Numbers: ER22–69–000.

Applicants: Indeck Niles, LLC.

Description: Supplement to October 7, 2021 Indeck Niles, LLC tariff filing.

Filed Date: 11/15/21.

Accession Number: 20211115–5226.

Comment Date: 5 p.m. ET 1/3/22.

Docket Numbers: ER22–703–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Revisions to PJM's FTR Credit Requirement and Request for 28-Day Comment Period to be effective 2/27/2022.

Filed Date: 12/21/21.

Accession Number: 20211221–5202.

Comment Date: 5 p.m. ET 1/11/22.

Docket Numbers: ER22–705–000.

Applicants: New York Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 205: Market Power Mitigation Measures that apply to uneconomic production to be effective 2/21/2022.

Filed Date: 12/22/21.

Accession Number: 20211222–5059.

Comment Date: 5 p.m. ET 1/12/22.

Docket Numbers: ER22–706–000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: Revisions to the Formula Rate for Southwestern Public Service Co. (''SPS'') to be effective 10/1/2021.

Filed Date: 12/22/21.

Accession Number: 20211222–5100.

Comment Date: 5 p.m. ET 1/12/22.

Docket Numbers: ER22–707–000.

Applicants: ISO New England Inc., New England Power Company.

Description: § 205(d) Rate Filing: ISO New England Inc. submits tariff filing per 35.13(a)(2)(iii: New England Power; Second Revised Service Agreement No. TSA–NEP–86 to be effective 1/1/2022.

Filed Date: 12/22/21.
Accession Number: 20211222–5117.
Comment Date: 5 p.m. ET 1/12/22.

Docket Numbers: ER22–708–000.
Applicants: Alabama Power Company.
Description: Tariff Amendment: Jefferson County Solar LGIA Termination Filing to be effective 12/22/2021.
Filed Date: 12/22/21.
Accession Number: 20211222–5128.
Comment Date: 5 p.m. ET 1/12/22.

Docket Numbers: ER22–709–000.
Applicants: Missouri Joint Municipal Electric Utility Commission, Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: Missouri Joint Municipal Electric Utility Commission submits tariff filing per 35.13(a)(2)(iii: Missouri Joint Municipal Electric Utility Commission Formula Rate to be effective 12/31/9998.
Filed Date: 12/22/21.
Accession Number: 20211222–5129.
Comment Date: 5 p.m. ET 1/12/22.

Docket Numbers: ER22–710–000.
Applicants: Alabama Power Company.
Description: Tariff Amendment: Sycamore Solar LGIA Termination Filing to be effective 12/22/2021.
Filed Date: 12/22/21.
Accession Number: 20211222–5130.
Comment Date: 5 p.m. ET 1/12/22.

Docket Numbers: ER22–711–000.
Applicants: Alabama Power Company.
Description: § 205(d) Rate Filing: Sawmill Junction Solar Park Amended and Restated LGIA Filing to be effective 11/9/2021.
Filed Date: 12/22/21.
Accession Number: 20211222–5131.
Comment Date: 5 p.m. ET 1/12/22.

Docket Numbers: ER22–712–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original ISA, Service Agreement No. 6274; Queue No. AE2–133 to be effective 11/23/2021.
Filed Date: 12/22/21.
Accession Number: 20211222–5138.
Comment Date: 5 p.m. ET 1/12/22.

Docket Numbers: ER22–713–000.
Applicants: American Transmission Systems, Incorporated, PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: American Transmission Systems, Incorporated submits tariff filing per 35.13(a)(2)(iii: ATSI submits one ECSA, SA No. 6145 to be effective 2/21/2022.
Filed Date: 12/22/21.
Accession Number: 20211222–5164.
Comment Date: 5 p.m. ET 1/12/22.

Docket Numbers: ER22–714–000.
Applicants: Mid-Atlantic Interstate Transmission, LLC, PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Mid-Atlantic Interstate Transmission, LLC submits tariff filing per 35.13(a)(2)(iii: MAIT submits two ECSAs, SA Nos. 6146 and 6147 to be effective 2/21/2022.
Filed Date: 12/22/21.
Accession Number: 20211222–5168.
Comment Date: 5 p.m. ET 1/12/22.

Docket Numbers: ER22–715–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: ISA, SA No. 6276; Queue No. AE2–060 to be effective 11/23/2021.
Filed Date: 12/22/21.
Accession Number: 20211222–5171.
Comment Date: 5 p.m. ET 1/12/22.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES22–18–000.
Applicants: Portland General Electric Company.
Description: Amendment to Application Under Section 204 of the Federal Power Act for Authorization to Issue Securities of Portland General Electric Company.
Filed Date: 12/21/21.
Accession Number: 20211221–5222.
Comment Date: 5 p.m. ET 1/4/22.

Take notice that the Commission received the following public utility holding company filings:

Docket Numbers: PH22–3–000.
Applicants: Consumers Energy Company.
Description: CMS Energy Corporation submits FERC 65–B Notice of Change in Fact to Waiver Notification.
Filed Date: 12/20/21.
Accession Number: 20211220–5273.
Comment Date: 5 p.m. ET 1/10/22.

The filings are accessible in the Commission's eLibrary system by clicking on the links or 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: December 22, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–28298 Filed 12–28–21; 8:45 am]

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP21–492–000]

Rover Pipeline LLC; Notice of Schedule for the Preparation of an Environmental Assessment for the Rover-Brightmark Receipt and Delivery Meter Station Project

On September 9, 2021, Rover Pipeline LLC (Rover) filed an application in Docket No. CP21–492–000 requesting a Certificate of Public Convenience and Necessity pursuant to Section 7(c) of the Natural Gas Act to construct and operate certain natural gas pipeline facilities in Michigan. The proposed project is known as the Rover-Brightmark Receipt and Delivery Meter Station Project (Project), and would allow Rover to construct a new interconnect on its existing mainline system to receive up to 1,600 dekatherms per day of natural gas from Brightmark SunRyz RNG LLC while also allowing Rover to deliver up to 100 dekatherms per day of natural gas to Brightmark SunRyz RNG LLC for its Brightmark Renewable Natural Gas Facility.

On September 20, 2021 the Federal Energy Regulatory Commission (Commission or FERC) issued its Notice of Application for the Project. Among other things, that notice alerted agencies issuing federal authorizations of the requirement to complete all necessary reviews and to reach a final decision on a request for a federal authorization within 90 days of the date of issuance of the Commission staff's environmental document for the Project.

This notice identifies Commission staff's intention to prepare an environmental assessment (EA) for the Project and the planned schedule for the completion of the environmental review.[1]

Schedule for Environmental Review

Issuance of EA—February 22, 2022
90-day Federal Authorization Decision Deadline—May 24, 2022

If a schedule change becomes necessary, additional notice will be

[1] 40 CFR 1501.10 (2020).

provided so that the relevant agencies are kept informed of the Project's progress.

Project Description

The Project would consist of Rover constructing and operating a new interconnect and meter station on its existing Market Area Mainline at about milepost 30.5 in Lenawee County, Michigan. The proposed meter station would include hot taps, valves, 65 feet of interconnecting pipe, two meter skids, a gas quality building, a measurement building, and satellite communications. Construction of the proposed facilities would impact about 2.0 acres.

Background

On October 26, 2021, the Commission issued a *Notice of Scoping Period Requesting Comments on Environmental Issues for the Proposed Rover-Brightmark Receipt and Delivery Meter Station Project and Notice of Public Scoping Session* (Notice of Scoping). The Notice of Scoping was sent to affected landowners; federal, state, and local government agencies; elected officials; environmental and public interest groups; Native American tribes; other interested parties; and local libraries and newspapers. In response to the Notice of Scoping, the Commission received comments from the U.S. Environmental Protection Agency. The U.S. Environmental Protection Agency commented on identifying the Project purpose and need; and assessing impacts on socioeconomics and environmental justice communities, greenhouse gas emissions, climate change, vegetation and wildlife, surface and groundwater quality, and karst terrain. All substantive comments will be addressed in the EA.

Additional Information

In order to receive notification of the issuance of the EA and to keep track of formal issuances and submittals in specific dockets, the Commission offers a free service called eSubscription. This service provides automatic notification of filings made to subscribed dockets, document summaries, and direct links to the documents. Go to *https://www.ferc.gov/ferc-online/overview* to register for eSubscription.

Additional information about the Project is available from the Commission's Office of External Affairs at (866) 208–FERC or on the FERC website (*www.ferc.gov*). Using the ''eLibrary'' link, select ''General Search'' from the eLibrary menu, enter the selected date range and ''Docket Number'' excluding the last three digits (*i.e.,* CP21–492), and follow the instructions. For assistance with access to eLibrary, the helpline can be reached at (866) 208–3676, TTY (202) 502–8659, or at *FERCOnlineSupport@ferc.gov.* The eLibrary link on the FERC website also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rule makings.

Dated: December 22, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–28294 Filed 12–28–21; 8:45 am]

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2361–056]

Allete, Inc.; Notice of Application Tendered for Filing With The Commission and Establishing Procedural Schedule for Licensing and Deadline for Submission of Final Amendments

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.a. *Type of Application:* Subsequent License.b. *Project No.:* 2361–056.c. *Date filed:* December 20, 2021.d. *Applicant:* Allete, Inc. (Allete).e. *Name of Project:* Prairie River Hydroelectric Project (Prairie River Project).f. *Location:* On the Prairie River, near the Township of Arbo in Itasca County, Minnesota. The project does not include any federal lands.g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).h. *Applicant Contact:* Mr. David R. Moeller, Senior Attorney & Director of Regulatory Compliance, ALLETE, Inc., d.b.a. Minnesota Power, 30 West Superior Street, Duluth, MN 55802, 218–723–3963, *dmoeller@allete.com*.i. *FERC Contact:* Laura Washington (202) 502–6072, *Laura.Washington@ferc.gov*.j. This application is not ready for environmental analysis at this time.k. The Prairie River Project consists of the following existing facilities: (1) A 1,305-acre reservoir; (2) a concrete dam; (3) a reinforced-concrete penstock extending from the forebay via a surge tank to the powerhouse; (4) 2,500-foot-long bypass reach; (5) a powerhouse containing two generating units with a total installed capacity of 1.1 megawatts; and (6) a 2.3/23-kilovolt transmission bank.

The Prairie River Project is currently operated in a run-of-river mode and generates an annual average of approximately 3,087,000 kilowatt hours. Allete proposes to continue operating the project as a run-of-river facility and does not propose any new construction to the project.l. A copy of the application can 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. 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 on March 13, 2020. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or (202) 502–8659 (TTY).m. 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, contact FERC Online Support.n. *Procedural schedule:* The application will be processed according to the following preliminary schedule. Revisions to the schedule will be made as appropriate.

Milestone	Target date
Issue Deficiency Letter (if necessary).	January 2022.
Request Additional Information ..	February 2022.
Notice of Acceptance/Notice of Ready for Environmental Analysis.	June 2022.

Dated: December 22, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–28297 Filed 12–28–21; 8:45 am]

BILLING CODE 6717–01–P795

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OAR–2021–0643; FRL–9286–01–OAR]

Consideration of Negotiated Rulemaking for Petitions Granted or Partially Granted Under Subsection (i) of the American Innovation and Manufacturing Act of 2020

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The purpose of this notice is to inform the public of the Environmental Protection Agency's consideration of the negotiated rulemaking procedure provided for under the Negotiated Rulemaking Act of 1990, and the Agency's decision to not use these procedures for a rulemaking under subsection (i) of the American Innovation and Manufacturing Act of 2020 that will address ten petitions that were granted and one petition that was partially granted by the Agency under this subsection on October 7, 2021.

DATES: Petitions referenced in this notice were granted by the Administrator via letters signed on October 7, 2021; thus, EPA is required by statute to promulgate a final rule or rules by October 7, 2023.

FOR FURTHER INFORMATION CONTACT: Joshua Shodeinde, Stratospheric Protection Division, Office of Atmospheric Programs (6205T), Environmental Protection Agency, telephone number: 202–564–7037; email address: *shodeinde.joshua@epa.gov.* You may also visit EPA's website at *https://www.epa.gov/climate-hfcs-reduction* for further information.

SUPPLEMENTARY INFORMATION:

I. Background

On October 7, 2021, the Administrator granted or partially granted eleven petitions submitted under subsection (i) of the American Innovation and Manufacturing Act of 2020 (AIM Act or Act).[1] [2] This subsection provides that the Administrator may by rule restrict, fully, partially, or on a graduated schedule, the use of a regulated substance [3] in the sector or subsector in which the regulated substance is used. Under subsection (i)(3) a person may petition the Administrator to promulgate a rule for the restriction on use of a regulated substance in a sector or subsector which shall include a request that the Administrator negotiate with stakeholders in accordance with subsection (i)(2)(A). Where the Agency grants a petition submitted under subsection (i), the statute requires that EPA promulgate a final rule not later than two years from the date the Agency grants the petition. Prior to issuing a proposed rule under subsection (i) for the use of a regulated substance for a sector or subsector, subsection (i)(2)(A) directs EPA to consider negotiating with stakeholders in the sector or subsector subject to the potential rule in accordance with negotiated rulemaking procedures established under subchapter III of chapter 5 of title 5, United States Code (commonly known as the ''Negotiated Rulemaking Act of 1990''). Under subsection (i)(2)(C), if the Administrator does not negotiate a rulemaking with stakeholders, the Administrator shall publish an explanation of the decision of the Administrator to not use that procedure. This notice provides that explanation of the Agency's decision not to use a negotiated rulemaking for the rulemaking process that EPA plans to commence to address the eleven petitions that were granted or partially granted on October 7, 2021.

II. What is a negotiated rulemaking?

The purpose of the Negotiated Rulemaking Act of 1990,[4] as stated in 5 U.S.C. 561, is to establish a framework for the conduct of negotiated rulemaking to encourage agencies to use the process when it enhances the informal rulemaking process. The Negotiated Rulemaking Act authorizes an agency to establish a negotiated rulemaking committee to negotiate and develop a proposed agency rule if the head of the agency determines that the use of the negotiated rulemaking procedure is in the public interest. In making such a determination, the Negotiated Rulemaking Act provides that the head of the agency shall consider whether: (1) There is a need for a rule; (2) there are a limited number of identifiable interests that will be significantly affected by the rule; (3) there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who can adequately represent the identified interests and are willing to negotiate in good faith to reach a consensus on the proposed rule; (4) there is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time; (5) the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule; (6) the agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee; and (7) the agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee with respect to the proposed rule as the basis for the rule proposed by the agency for notice and comment.

If a head of agency determines that the use of the negotiated rulemaking procedure is in the public interest, an agency may convene a federally chartered advisory committee, and may rely on an appointed convener under 5 U.S.C. 563(b) to assist with ascertaining the names of persons who are willing and qualified to represent interests that will be significantly affected by the proposed rule. If the agency decides to establish a negotiated rulemaking committee, the agency must publish in the **Federal Register** and in relevant publications a notice announcing the agency's intention to establish a negotiated rulemaking committee, a description of the subject and scope of the rule, a list of the interests which are likely to be significantly affected by the rule, a list of the persons proposed to represent such interests and the proposed agency representatives, a proposed agenda and schedule for completing the committee's work, a description of the administrative and technical support to be provided to the committee by the agency, a solicitation for comments on the proposal to establish the committee and on the proposed membership of the committee, and an explanation of how a person may apply or nominate another person for membership on the committee. The agency must provide at least 30 calendar

[1] The AIM Act was enacted as section 103 in Division S, Innovation for the Environment, of the Consolidated Appropriations Act, 2021 (Pub. L. 116–260). In general terms, the AIM Act provides EPA authorities to address HFCs in three main areas: Phasing down the production and consumption of listed HFCs; managing these HFCs and their substitutes; and facilitating technology transitions by restricting use of these HFCs in the sector or subsector in which they are used.

[2] For a list of petitions granted or partially granted, see *Determination to Grant or Partially Grant Certain Petitions Submitted Under Subsection (i) of the American Innovation and Manufacturing Act of 2020*, 86 FR 57141 (October 14, 2021).

[3] The Act provides that ''regulated substance'' refers to those substances included in the list in subsection (c)(1) of the Act and those substances that the Administrator has designated as a regulated substance under subsection (c)(3). Subsection (c)(1) lists 18 saturated HFCs, and by reference their isomers not so listed, as regulated substances. This is the current list of regulated substances, as no additional substances have been designated as regulated substances under subsection (c)(3).

[4] The Negotiated Rulemaking Act of 1990 was reauthorized in 1996 and is now incorporated into the Administrative Procedure Act, at 5 U.S.C. 561–570.

days for the submission of comments and applications related to the membership of the committee. In establishing and administering such a committee, the agency shall comply with the Federal Advisory Committee Act, unless an exception applies. If the committee reaches consensus on a proposed rule, the committee shall transmit a report containing the proposed rule to the federal agency. If the committee does not reach a consensus on a proposed rule, the committee may transmit a report specifying any areas upon which consensus was reached. The proposed rule is still subject to public comment, and for purposes of a rulemaking developed under the AIM Act, the requirements of CAA section 307(d).

Under the Negotiated Rulemaking Act, any agency action relating to establishing, assisting, or terminating a negotiated rulemaking committee shall not be subject to judicial review. 5 U.S.C. 570.

III. Petitioners' Statements on Use of Negotiated Rulemaking Procedures

All petitioners indicated their support for EPA not to use negotiated rulemaking procedures in developing a proposed rulemaking associated with their petitions, and to instead rely solely on a traditional notice-and-comment rulemaking process. Per AIM Act section (k)(1)(C) and CAA section 307(d)(1)(I), the rulemaking is governed by CAA section 307(d). Nearly all petitioners indicated that with regards to their petition requests, the negotiated rulemaking process is not needed and would not be efficient because many of the petition requests have already undergone extensive stakeholder processes. For example, petitioners pointed out that in many cases, their requests align with changes of status decisions contained in EPA's Significant New Alternatives Policy (SNAP) program's rules 20 and 21 [5] and state HFC laws and regulations,[6] and therefore the substantive requests in the petitions have already been vetted through federal or state rulemaking or legislative processes.[7] Petitioners representing industry trade associations such as the American Chemistry Council's Center for Polyurethane Industry, the Association of Home Appliance Manufacturers, and the Air Conditioning, Heating, and Refrigeration Institute indicate that their requests represent the consensus view of the vast majority of industry stakeholders who may be subject to compliance obligations based on their petitions. These petitioners assert that a negotiated rulemaking would provide no value for stakeholders, the public, and the potentially regulated community because a traditional notice-and-comment rulemaking provides ''a suitably transparent and representative regulatory process.'' [8]

Petitioners also note that a negotiated rulemaking may unnecessarily delay timely action by the Agency. Several petitions stress the need for quick action from the Agency in finalizing a rule to create a federal regulatory framework, maximize potential climate and environmental benefits, and to give industry sufficient time to prepare to transition away from using HFCs. These petitioners suggest that using negotiated rulemaking procedures requires more commitment of time and resources that may unnecessarily delay action.

One petitioner raised concerns with protecting intellectual property (IP) and trade secrets if EPA uses a negotiated rulemaking.[9] According to the petitioner, potential release of sensitive information would effectually block technology category-based discussions from occurring and thus could unnecessarily limit discussions as well as reach consensus.

IV. EPA's Considerations of Criteria Under the Negotiated Rulemaking Act

The Negotiated Rulemaking Act of 1990, 5 U.S.C. 563, provides seven criteria that the head of the agency shall consider when determining whether a negotiated rulemaking is in the public interest. We think these criteria are informative for purposes of making the determination under AIM Act subsection (i) of whether to use the procedures set out in the Negotiated Rulemaking Act for the proposed rule or rules associated with the 11 granted and partially granted petitions. EPA's consideration of each criteria is described below.

Criteria (1) whether there is a need for a rule: The AIM Act requires that EPA promulgate a final rule in response to granted petitions under subsection (i) of the AIM Act.

Criteria (2) whether there are a limited number of identifiable interests that will be significantly affected by the rule: The petitions at issue request the EPA to promulgate restrictions on the use of HFCs in an array of applications across many industries that would affect residential and business consumers in the air conditioning, refrigeration, aerosols, and spray foams spaces. Because of the similarities in the granted petitions, EPA is considering consolidating the issues into significantly fewer than 11 separate rulemakings. We may also, as part of the anticipated rule or rules, consider additional issues not raised in the petitions. For example, initial rulemaking under subsection (i) may also address framework elements that are broader than what is covered by the petitions (*e.g.*, definitions, applicability, recordkeeping). Given the nature of these particular petition requests and the anticipated scope of rulemaking, it is unlikely that there are a ''limited'' number of identifiable interests; on the contrary, a significant number of entities are likely interested and may be impacted by forthcoming rules.

Criteria (3) whether there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who can adequately represent the identified interests and are willing to negotiate in good faith to reach a consensus on the proposed rule: EPA granted ten petitions and partially granted one other petition that covered over 40 applications in the refrigeration, air conditioning, foam, and aerosol sectors, with some petitions covering multiple applications. Although EPA has a long history working with a diverse group of stakeholders in all applications covered by the granted petitions under various CAA Title VI authorities (*e.g.*, sections 608, 609, 610, 612), the broad range of applications would make it difficult to convene a committee that would be representative of all interested groups.

Criteria (4) whether there is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time: Based

[5] After a court challenge, the D.C. Circuit partially vacated the SNAP Rule 20 ''to the extent it requires manufacturers to replace HFCs with a substitute substance,'' and remanded to EPA for further proceedings. *Mexichem Fluor, Inc.* v. *EPA,* 866 F.3d 451, 464 (D.C. Cir. 2017). However, the court upheld EPA's decisions in that rule to change the listings for certain HFCs in certain SNAP end-uses from acceptable to unacceptable as being reasonable and not arbitrary and capricious. *Id.* at 462–64. The same court later issued a similar partial vacatur for portions of the SNAP Rule 21. *See Mexichem Fluor, Inc.* v. *EPA,* 760 Fed. Appx. 6 (Mem) (per curiam) (D.C. Cir. 2019).

[6] A number of states have established legislative and/or regulatory restrictions on the use of HFCs in sectors. These include California, Colorado, Delaware, Maine, Maryland, Massachusetts, New Jersey, New York, Rhode Island, Virginia, Vermont, Washington.

[7] See *https://ww2.arb.ca.gov/our-work/programs/hfc-reduction-measures/rulemaking.*

[8] See, for example, the Association of Home Appliance Manufacturers and the Air Conditioning, Heating, and Refrigeration Institute petitions, available at *https://www.regulations.gov/document/EPA-HQ-OAR–2021–0289–0005* and *https://www.regulations.gov/document/EPA-HQ-OAR–2021–0289–0012*, respectively.

[9] See DuPont comment letter submitted on August 9, 2021, available at *https://www.regulations.gov/comment/EPA-HQ-OAR–2021–0289–0043.*

on the information provided by petitioners in section III above, and letters of support submitted to the docket,[10] there appears to be consensus among different interest groups to move forward with proposing HFC restrictions similar to those contained in petitions. However, there may also be entities potentially affected by proposed rules who have yet to indicate their interest to the Agency. Additionally, EPA has identified a few applications—specifically in industrial process refrigeration (without chillers) and chillers for industrial process refrigeration—where certain petitioners have requested different HFC restrictions. Therefore, it is not clear whether a committee could reach a consensus on the proposed rule within a fixed period of time.

Criteria (5) whether the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule: Given the number of granted petitions, the wide variety of stakeholders, and the number of applications at issue, seeking to identify and convene a negotiated rulemaking committee and following other provisions under the Negotiated Rulemaking Act of 1990, such as publishing a list of potential committee members and awaiting public comment on this list, would likely cause delay in proposing and finalizing a rulemaking in the timeframe provided by the statute.

Criteria (6) whether the agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee: If the determination here or in the future is that a negotiated rulemaking is appropriate, then EPA would take steps to commit resources, including technical assistance to a committee.

Criteria (7) whether the agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee with respect to the proposed rule as the basis for the rule proposed by the agency for notice and comment: Should the Agency decide to use negotiated rulemaking procedures now or in the future, the Agency would propose rules for notice and comment consistent with language developed by the negotiated rulemaking committee.

[10] For a list of comments received on petitions, see ''NODA Comments'' at *www.regulations.gov*, under Docket ID EPA-HQ-OAR–2021–0643. These comments were originally submitted to Docket ID EPA-HQ-OAR–2021–0289.

V. EPA's Decision Not to Use the Negotiated Rulemaking Procedure

We have considered the information provided by petitioners and the criteria listed in section 5 U.S.C. 563 of the Negotiated Rulemaking Act of 1990. In our assessment, using the negotiated rulemaking procedure to develop the proposed rule or rules associated with the eleven AIM Act petitions at issue is not in the public interest. For these eleven petitions, we do not think the negotiated rulemaking procedure for identifying, nominating, and taking comment on a relatively limited group of interested parties would be beneficial to reaching consensus given the potential breadth and scope of the rule or rules associated with the eleven petitions. The Agency would be able to reach a broader audience through other means than it would using the negotiated rulemaking procedure. For example, we could conduct stakeholder meetings prior to the proposal of a rule to solicit early feedback and additional information from stakeholders directly; using a negotiated rulemaking committee could limit the feedback EPA receives to members of the negotiated rulemaking committee, and because the procedure favors nominating individuals to represent certain interests, the procedure could result in failing to capture the nuances of similarly situated but not identical interests. In addition, the Agency views the regular notice-and-comment rulemaking process on its own as providing robust public engagement avenues that will allow for all interested stakeholders to provide input and represent their interests to EPA. Based on these considerations, the Agency has decided not to use a negotiated rulemaking procedure for the rule or rules associated with the eleven petitions under subsection (i) of the AIM Act.

Michael S. Regan,

Administrator.

[FR Doc. 2021–28281 Filed 12–28–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2019–0237; FRL–9283–01–OCSPP]

Cyclic Aliphatic Bromide Cluster (HBCD); Draft Revision to Toxic Substances Control Act (TSCA) Risk Determination; Notice of Availability and Request for Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is announcing the availability of and requesting public comment on a draft revision to the risk determination for the Cyclic Aliphatic Bromide Cluster (HBCD) risk evaluation issued under TSCA. The draft revision to the HBCD risk determination was developed following a review of the first ten risk evaluations issued under TSCA that was done in accordance with Executive Orders and other Administration priorities, including those on environmental justice, scientific integrity, and regulatory review, and this draft revision reflects the announced policy changes to ensure the public is protected from unreasonable risks from chemicals in a way that is supported by science and the law. Specifically, in this draft revision to the risk determination EPA finds that HBCD, as a whole chemical substance, presents an unreasonable risk of injury to health and the environment when evaluated under its conditions of use. This draft revision supersedes the condition of use-specific no unreasonable risk determinations in the September 2020 HBCD risk evaluation (and withdraw the associated order) and makes a revised determination of unreasonable risk for HBCD as a whole chemical substance. In addition, this draft revised risk determination does not reflect an assumption that workers always appropriately wear personal protective equipment (PPE).

DATES: Comments must be received on or before February 14, 2022.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2019–0237, using the Federal eRulemaking Portal at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

Due to the public health concerns related to COVID–19, the EPA Docket Center (EPA/DC) and Reading Room is open to visitors by appointment only. For the latest status information on EPA/DC services and docket access, visit *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: *For technical information contact:* Sarah Cox, Office of Pollution Prevention and Toxics (7404T), Environmental

Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 564–3961; email address: *Cox.Sarah@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Does this action apply to me?

This action is directed to the public in general. This action may, however, be of interest to those involved in the manufacture, processing, distribution, use, disposal, and/or the assessment of risks involving chemical substances and mixtures. You may be potentially affected by this action if you manufacture (defined under TSCA to include import), process (including recycling), distribute in commerce, use or dispose of HBCD, including HBCD in products. Since other entities may also be interested in this draft revision to the risk determination, the EPA has not attempted to describe all the specific entities that may be affected by this action.

B. What is EPA's authority for taking this action?

TSCA section 6, 15 U.S.C. 2605, requires EPA to conduct risk evaluations to determine whether a chemical substance presents an unreasonable risk of injury to health or the environment, without consideration of costs or other non-risk factors, including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant to the risk evaluation by the Administrator, under the conditions of use. 15 U.S.C. 2605(b)(4)(A). TSCA sections 6(b)(4)(A) through (H) enumerate the deadlines and minimum requirements applicable to this process, including provisions that provide instruction on chemical substances that must undergo evaluation, the minimum components of a TSCA risk evaluation, and the timelines for public comment and completion of the risk evaluation. TSCA also requires that EPA operate in a manner that is consistent with the best available science, make decisions based on the weight of the scientific evidence and consider reasonably available information. 15 U.S.C. 2625(h), (i), and (k).

The statute identifies the minimum components for all chemical substance risk evaluations. For each risk evaluation, EPA must publish a document that outlines the scope of the risk evaluation to be conducted, which includes the hazards, exposures, conditions of use, and the potentially exposed or susceptible subpopulations that EPA expects to consider. 15 U.S.C. 2605(b)(4)(D). The statute further provides that each risk evaluation must also: (1) Integrate and assess available information on hazards and exposures for the conditions of use of the chemical substance, including information that is relevant to specific risks of injury to health or the environment and information on relevant potentially exposed or susceptible subpopulations; (2) describe whether aggregate or sentinel exposures were considered and the basis for that consideration; (3) take into account, where relevant, the likely duration, intensity, frequency, and number of exposures under the conditions of use; and (4) describe the weight of the scientific evidence for the identified hazards and exposures. 15 U.S.C. 2605(b)(4)(F)(i) through (ii) and (iv) through (v). Each risk evaluation must not consider costs or other non-risk factors. 15 U.S.C. 2605(b)(4)(F)(iii).

EPA has inherent authority to reconsider previous decisions and to revise, replace, or repeal a decision to the to the extent permitted by law and supported by reasoned explanation. *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009); *see also Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Auto. Ins. Co.,* 463 U.S. 29, 42 (1983). Further, on August 10, 2021, the Ninth Circuit granted EPA's motion for voluntary remand without vacatur, so that EPA may conduct reconsideration proceedings on the HBCD Risk Evaluation–particularly to reconsider the no unreasonable risk determinations made within. *Alaska Community Action on Toxics at al.,* v. *U.S. Environmental Protection Agency et al.,* (9th Cir. No. 20–73099).

C. What action is EPA taking?

EPA is announcing the availability of and seeking public comment on a draft revision to the risk determination for the risk evaluation for HBCD under TSCA, published in September 2020. EPA is specifically seeking public comment on the draft revision to the risk determination for the risk evaluation where the Agency intends to determine if HBCD, as a whole chemical substance, presents an unreasonable risk of injury to health and the environment when evaluated under its conditions of use. This whole chemical approach to determining unreasonable risk to health is permissible under EPA's statutory obligations under TSCA section 6(b)(4) and the implementing regulations and would revise and replace section 5 of the 2020 risk evaluation for HBCD where the findings of unreasonable risk to health and the environment were previously made for the individual conditions of use evaluated.

This revision would be consistent with EPA's plans to revise specific aspects of the first ten TSCA chemical risk evaluations in order to ensure that the risk evaluations better align with TSCA's objective of protecting health and the environment. Under the proposed changes, the same six conditions of use would continue to drive the unreasonable risk determination for HBCD. However, the impact of removing the assumption of PPE use by workers would cause four of the six conditions of use that drive the unreasonable risk determination based on only risks to the environment to also drive unreasonable risk based on health risks to workers. The four conditions of use affected by this proposed change are: Import; Processing: Incorporation into formulation, mixture, or reaction products; Processing: Incorporation into articles; and Processing: Recycling (of XPS and EPS foam, resin, panels containing HBCD). Overall, six conditions of use would drive the HBCD whole chemical unreasonable risk determination due to risks identified for both the environment and health. *The full list of the conditions of use evaluated for the HBCD TSCA risk evaluation is in Table 8–1 of the risk evaluation* available here *https://www.epa.gov/sites/default/files/2020-09/documents/1._risk_evaluation_for_cyclic_aliphatic_bromide_cluster_hbcd_casrn25637-99-4_casrn_3194-5_casrn_3194-57-8.pdf.*

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

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your

comments, see the commenting tips at *http://www.epa.gov/dockets/comments.html.*

II. Background

A. Why is EPA re-issuing the risk determination for the HBCD risk evaluation conducted under TSCA?

In 2016, as directed by TSCA section 6(b)(2)(A), EPA chose the first ten chemical substances to undergo risk evaluations under the amended TSCA. These chemical substances are asbestos, 1-bromopropane, carbon tetrachloride, C.I. Pigment Violet 29, HBCD, 1,4-dioxane, methylene chloride, n-methylpyrrolidone (NMP), perchloroethylene (PCE), and trichloroethylene (TCE).

From June 2020 to January 2021, EPA published risk evaluations on the first ten chemical substances, including for HBCD in September 2020. The risk evaluations included individual unreasonable risk determinations for each condition of use evaluated. The determinations that particular conditions of use did not present an unreasonable risk were issued by order under TSCA section 6(i)(1).

In accordance with Executive Order 13990 (Ref. 2) and other Administration priorities (Refs. 1, 3, and 4), EPA reviewed the risk evaluations for the first ten chemical substances to ensure that they meet the requirements of TSCA, including conducting decision-making in a manner that is consistent with the best available science.

As a result of this review, EPA announced plans to revise specific aspects of the first ten risk evaluations in order to ensure that the risk evaluations appropriately identify unreasonable risks and thereby help ensure the protection of human health and the environment available here *https://www.epa.gov/newsreleases/epa-announces-path-forward-tsca-chemical-risk-evaluations.* To that end, EPA is reconsidering two key aspects of the risk determinations for HBCD published in September 2020. First, EPA proposes that the appropriate approach to these determinations under the statute and implementing regulations is to make an unreasonable risk determination for HBCD as a whole chemical substance, rather than making unreasonable risk determinations separately on each individual condition of use evaluated in the risk evaluation. Second, EPA proposes that the risk determination should be explicit that it does not rely on assumptions regarding the use of personal protective equipment (PPE) in making the unreasonable risk determination under TSCA section 6; rather, the use of PPE would be considered during risk management.

This action pertains only to the risk determination for HBCD. While EPA intends to consider and may take additional similar actions on other of the first ten chemicals, EPA is taking a chemical-specific approach to reviewing these risk evaluations and is incorporating new policy direction in a surgical manner, while being mindful of Congressional direction on the need to complete risk evaluations and move toward any associated risk management activities in accordance with statutory deadlines. To the extent the Agency deems appropriate, additional actions may follow that are specific to each of the other chemical substances for which EPA has issued completed risk evaluations under TSCA section 6.

B. What is a whole chemical view of the unreasonable risk determination for the HBCD risk evaluation?

TSCA section 6 repeatedly refers to determining whether a chemical *substance* presents unreasonable risk under its conditions of use. Stakeholders have disagreed over whether a chemical substance should receive: A single determination that is comprehensive for the chemical substance after considering the conditions of use, referred to as a whole-chemical determination; or multiple determinations, each of which is specific to a condition of use, referred to as condition-of-use-specific determinations. EPA acknowledges a lack of specificity in the statute and inconsistency in the regulations with respect to the presentation of risk determinations in TSCA risk evaluations.

The proposed Risk Evaluation Rule (Ref. 5), was premised on the whole chemical approach to making unreasonable risk determinations. EPA acknowledged a lack of specificity in whether the statute compelled EPA's risk evaluations to address all conditions of use of a chemical substance or whether EPA had discretion to evaluate some subset of conditions of use (*i.e.,* to scope out some manufacturing, processing, distribution in commerce, use, or disposal activities). The proposed rule, however, was unambiguous on the point that unreasonable risk determinations would be for the chemical substance as a whole, even if based on a subset of uses. See Ref. 5 at 7565–66 (TSCA section 6(b)(4)(A) specifies that a risk evaluation must determine whether 'a chemical substance' presents an unreasonable risk of injury to health or the environment 'under the conditions of use.' The evaluation is on the chemical substance—not individual conditions of use—and it must be based on 'the conditions of use.' In this context, EPA believes the word 'the' is best interpreted as calling for evaluation that considers all conditions of use.). In proposed regulatory text, EPA proposed to ''determine whether the chemical substance presents an unreasonable risk of injury to health or the environment under the conditions of use as identified in the final scope document . . .'' Ref. 5 at 7480.

As stated in the final Risk Evaluation Rule (82 FR 33726, July 20, 2017) (FRL–9964–38) (Ref. 6): As part of the risk evaluation, EPA will determine whether the chemical substance presents an unreasonable risk of injury to health or the environment under each condition of uses [sic] within the scope of the risk evaluation, either in a single decision document or in multiple decision documents (40 CFR 702.47). For the unreasonable risk determinations in the first ten risk evaluations, EPA applied this provision by making individual risk determinations for each condition of use evaluated as part of each risk evaluation document (*i.e.,* the condition-of-use-specific approach to risk determinations). That approach was based on one particular passage in the preamble to the final Risk Evaluation Rule: The final step of a risk evaluation is for EPA to determine whether the chemical substance, under the conditions of use, presents an unreasonable risk of injury to health or the environment. EPA will make individual risk determinations for all uses identified in the scope. This part of the regulation is slightly amended from the proposed rule, to clarify that the risk determination is part of the risk evaluation, as well as to account for the revised approach to that [sic] ensures each condition of use covered by the risk evaluation receives a risk determination. (Ref. 6 at 33744).

In contrast to this portion of the preamble of the final Risk Evaluation Rule, the regulatory text itself and other statements in the preamble reference a risk determination *for the chemical substance* under its conditions of use, rather than separate risk determinations for each of the conditions of use of a chemical substance. In the key regulatory provision excerpted previously from 40 CFR 702.47, the text explains that, [a]s part of the risk evaluation, EPA will determine whether *the chemical substance* presents an unreasonable risk of injury to health or the environment under each condition of uses [sic] within the scope of the risk evaluation, either in a single decision

document or in multiple decision documents (emphasis added). Other language reiterates this perspective. For example, 40 CFR 702.31(a) states that the purpose of the rule is to establish the EPA process for conducting a risk evaluation to determine whether a chemical substance presents an unreasonable risk of injury to health or the environment as required under TSCA section 6(b)(4)(B). Likewise, there are recurring references to whether the chemical substance presents an unreasonable risk in 40 CFR 702.41(a). See, for example, 40 CFR 702.41(a)(6), which states: [t]he extent to which EPA will refine its evaluations for one or more condition of use in any risk evaluation will vary as necessary to determine whether a chemical substance presents an unreasonable risk of injury to health or the environment. Notwithstanding the one preambular statement about condition-of-use-specific risk determinations, the preamble to the final rule also contains support for a risk determination on the chemical substance as a whole. In discussing the identification of the conditions of use of a chemical substance, the preamble notes that this task inevitably involves the exercise of discretion on EPA's part, and, as EPA interprets the statute, the Agency is to exercise that discretion consistent with the objective of conducting a technically sound, manageable evaluation to determine whether a chemical substance—not just individual uses or activities—presents an unreasonable risk. (Ref. 6 at 33729).

Therefore, notwithstanding EPA's choice to issue condition-of-use-specific risk determinations to date, EPA interprets its risk evaluation regulation to also allow the Agency to issue whole-chemical risk determinations. Either approach is permissible under the regulation. A panel of the Ninth Circuit Court of Appeals also recognized the ambiguity of the regulation on this point. *Safer Chemicals* v. *EPA,* 943 F.3d 397, 413 (9th Cir. 2019) (holding a challenge about ''use-by-use risk evaluations [was] not justiciable because it is not clear, due to the ambiguous text of the Risk Evaluation Rule, whether the Agency will actually conduct risk evaluations in the manner Petitioners fear''). EPA plans to consider the appropriate approach for each chemical substance risk evaluation on a case-by-case basis, taking into account considerations relevant to the specific chemical substance in light of the Agency's obligations under TSCA. The Agency expects that this case-by-case approach will provide greater flexibility in the Agency's ability to evaluate and manage unreasonable risk from individual chemical substances. For instance, circumstances in which an unreasonable risk determination is primarily driven by a single condition of use that does not impact or intersect with other evaluated uses (such as for example, a single consumer use of a substance out of a wide range of other manufacturing, processing and consumer uses evaluated) may warrant different treatment than circumstances in which the majority of the chemical substance's conditions of use contribute to unreasonable risk, and the Agency might adopt different approaches to the risk determinations in those particular instances. EPA anticipates that this flexibility will better serve TSCA's objectives by helping ensure that EPA is best positioned to present, and initiate risk management to address, chemical-specific unreasonable risk determinations. EPA believes this is a reasonable approach under TSCA and the Agency's implementing regulations.

With regard to the specific circumstances of HBCD, as further explained in this document, EPA proposes that a whole chemical approach better aligns with TSCA's objective of protecting health and the environment. For HBCD, EPA favors the whole chemical approach based in part on the benchmark exceedances for multiple conditions of use (spanning across most aspects of the chemical lifecycle—from manufacturing (import), processing, commercial and consumer use, and disposal) for both health and the environment and considering the physical-chemical properties of HBCD as a persistent, bioaccumulative and toxic substance, and the irreversible health effects associated with HBCD exposures. Since the chemical-specific properties cut across the conditions of use within the scope of the risk evaluation, the Agency's risk findings and conclusions encompass the majority of those conditions of use, and the Agency is better positioned to achieve its TSCA objectives for HBCD when issuing a whole chemical determination for HBCD, EPA concludes that the Agency's risk determination for HBCD is better characterized as a whole chemical risk determination rather than condition-of-use-specific risk determinations.

As explained later in this document, the revisions to the unreasonable risk determination (section 5 of the risk evaluation) would be based on the existing risk characterization section of the risk evaluation (section 4 of the risk evaluation) and would not involve additional technical or scientific analysis. The discussion of the issues in this **Federal Register** *Notice* and in the accompanying draft revision to the risk determination would supersede any conflicting statements in the prior HBCD risk evaluation and the response to comments document (Summary of External Peer Review and Public Comments and Disposition for HBCD). With respect to the HBCD risk evaluation, EPA intends to change the risk determination to a whole chemical approach and does not intend to amend, nor does a whole chemical approach require amending, the underlying scientific analysis of the risk evaluation in the risk characterization section of the risk evaluation. EPA also views the peer reviewed hazard and exposure assessments and associated risk characterization as robust and upholding the standards of best available science and weight of the scientific evidence per TSCA sections 26(h) and (i).

EPA is announcing the availability of and soliciting public comment on the draft superseding unreasonable risk determination for HBCD, including a list of the condition-of-use-specific risks driving the unreasonable risk determination for the chemical substance as a whole. For purposes of TSCA section 6(i), EPA is making a risk determination on HBCD as a whole chemical. Under the revised approach, EPA is proposing to supersede the no unreasonable risk determinations (and withdraw the associated order) for HBCD that were premised on a condition-of-use-specific approach to determining unreasonable risk.

C. What revision does EPA propose about the use of PPE for the HBCD risk evaluation?

In the risk evaluations for the first ten chemical substances, as part of the unreasonable risk determination, EPA assumed for several conditions of use that all workers were provided and always used PPE in a manner that achieves the stated assigned protection factor (APF) for respiratory protection, or protection factor (PF) for dermal protection. In support of this assumption, EPA used reasonably available information such as public comments indicating that some employers, particularly in the industrial setting, provide PPE to their employees and follow established worker protection standards (*e.g.,* Occupational Safety and Health Administration (OSHA) requirements for protection of workers).

For the September 2020 HBCD risk evaluation, EPA assumed that workers

used PPE for six of the twelve conditions of use:

- Import;
- *Processing:* Incorporating into formulation, mixture, or reaction products;
- *Processing:* Incorporation into article;
- *Processing:* Recycling (of XPS and EPS foam, resin, panels containing HBCD);
- *Processing:* Recycling (of electronics waste containing high impact polystyrene (HIPS) that contains HBCD); and
- *Commercial/Consumer Use:* Other—Formulated Products and Articles

When characterizing the risk to human health from occupational exposures during risk evaluation under TSCA, EPA believes it is appropriate to evaluate the levels of risk present in baseline scenarios where no mitigation measures are assumed to be in place. This approach considers the risk to potentially exposed or susceptible subpopulations of workers who may not be covered by OSHA standards, such as self-employed individuals and public sector workers who are not covered by a State Plan. In addition, EPA believes it is appropriate to evaluate the levels of risk present in scenarios considering applicable OSHA requirements (*e.g.,* chemical-specific permissible exposure limits (PELs) and/or chemical-specific PELs with additional substance-specific standards) as well as scenarios considering industry or sector best practices for industrial hygiene that are clearly articulated to the Agency. It should be noted that, in some cases, baseline conditions may reflect certain mitigation measures, such as engineering controls, in instances where exposure estimates are based on monitoring data at facilities that have engineering controls in place. Consistent with this approach, the September 2020 HBCD risk evaluation characterized risk to workers both with and without the use of PPE.

When undertaking unreasonable risk determinations as part of TSCA risk evaluations, however, EPA does not believe it is appropriate to assume as a general matter that an applicable OSHA requirement or industry practice is sufficient to address the risk, applicable to all potentially exposed workers, or consistently and always properly applied. Mitigation scenarios included in the EPA risk evaluation (*e.g.,* scenarios considering use of various PPE) likely represent what is happening already in some facilities. However, the Agency cannot assume that all facilities have adopted these practices for the purposes of making the TSCA risk determination. Additionally, as previously noted, self-employed individuals and public sector workers who are not covered by a State Plan are not covered by OSHA requirements. By characterizing risks using scenarios that reflect different levels of mitigation, EPA risk evaluations can help inform potential risk management actions by providing information that could be used during risk management to tailor risk mitigation appropriately to address any unreasonable risk identified.

Therefore, going forward, EPA intends to make its determination of unreasonable risk from a baseline scenario that does not assume compliance with OSHA standards, including any applicable exposure limits or requirements for use of respiratory protection or other PPE. Making unreasonable risk determinations based on the baseline scenario should not be viewed as an indication that EPA believes there are no occupational safety protections in place at any location, or that there is widespread non-compliance with applicable OSHA standards. Rather, it reflects EPA's recognition that unreasonable risk may exist for subpopulations of workers that may be highly exposed because they are not covered by OSHA standards, such as self-employed individuals and public sector workers who are not covered by a State Plan, or because their employer is out of compliance with OSHA standards, or because EPA finds unreasonable risk for purposes of TSCA notwithstanding OSHA requirements.

In accordance with this approach, EPA proposes that the draft revision to the HBCD risk determination not rely on assumptions regarding the occupational use of PPE in making the unreasonable risk determination under TSCA section 6; rather, the use of PPE would be considered during risk management. This would represent a change from the approach taken in the 2020 risk evaluation for HBCD and EPA invites comments on this proposed change to the HBCD risk determination. As a general matter, when undertaking risk management actions, EPA intends to strive for consistency with applicable OSHA requirements and industry best practices, including appropriate application of the hierarchy of controls, when those measures would address an unreasonable risk; ensure the EPA requirements apply to all potentially exposed workers; and develop occupational risk mitigation measures to address any unreasonable risks identified by EPA. Consistent with TSCA section 9(d), EPA will consult and coordinate TSCA activities with OSHA and other relevant Federal agencies for the purpose of achieving the maximum applicability of TSCA while avoiding the imposition of duplicative requirements. Informed by the mitigation scenarios and information gathered during the risk evaluation and risk management process, the Agency might propose rules that require risk management practices that may be already common practice in many or most facilities. Adopting clear, comprehensive regulatory standards will foster compliance across all facilities (ensuring a level playing field) and assure protections for all affected workers, especially in cases where current OSHA standards may not apply or be sufficient to address the unreasonable risk.

By removing the assumption of PPE use in making the whole chemical risk determination for HBCD the same six conditions of use would continue to drive the proposed unreasonable risk determination. However, the impact of removing the assumption of PPE use would cause four of the six conditions of use that drive the unreasonable risk determination based on only risks to the environment to also drive unreasonable risk based on health risks to workers. The four conditions of use affected by this change are:

- Import;
- *Processing:* Incorporation into formulation, mixture, or reaction products;
- *Processing:* Incorporation into article; and
- *Processing:* Recycling (of XPS and EPS foam, resin, panels containing HBCD).

The draft revision to the risk determination would clarify that EPA does not rely on the assumed use of PPE when making the risk determination for the whole substance. EPA is requesting comment on this potential change.

D. What is HBCD?

HBCD is a white odorless non-volatile solid that is used as a flame retardant and wetting agent. Domestic manufacture of HBCD ceased in 2017 and was therefore not considered as a condition of use for the risk evaluation. U.S. manufacturers have indicated complete replacement of HBCD in their product lines and that depletion of stockpiles and cessation of export was completed in 2017 based on communications with manufacturers. HBCD has also not been imported by any major importers since 2017; however, it is reasonably foreseen that small imports under the Chemical Data Reporting threshold may have

continued from countries that were not parties to the Stockholm Convention ban. About 95% of HBCD was historically used in insulation boards, primarily in construction materials, which may include structural insulated panels (SIPS). The category ''Building/Construction Materials'' includes products containing HBCD as a flame retardant primarily in XPS and EPS rigid foam insulation products that are used for the construction of residential, public, commercial, or other structures. HBCD is added to EPS and XPS foam in the form of a resin. EPS foam prevents freezing, provides a stable fill material, and creates high-strength composites in construction applications. XPS foam board is used mainly for roofing applications and architectural molding. Minor uses of HBCD include replacement car parts (polystyrene headliners and solder) and solder paste for electronics (circuit boards). Historically, HBCD was also manufactured (including import) and processed for additional articles that may still exist, including adhesives, coatings, sealants, textiles, and electronics.

E. What conclusions did EPA reach about the risks of HBCD in the TSCA risk evaluation based on the whole chemical approach and not assuming the use of PPE?

EPA determined that HBCD presents an unreasonable risk to health and the environment and the unreasonable risk is driven by risks associated with the following conditions of use, considered singularly or in combination with other exposures:

- Import;
- *Processing:* Incorporation into a Formulation, Mixture, or Reaction Products;
- *Processing:* Incorporation into Article;
- *Processing:* Recycling (of XPS and EPS foam, resin, and panels containing HBCD);
- *Commercial/Consumer Use:* Building/Construction Materials (Installation); and
- Disposal (Demolition).

Note: While commercial and consumer use was assessed as part of the same exposure scenario, risks were quantified separately, and consumer use was not found to contribute to unreasonable risk (Executive Summary of the Risk Evaluation).

III. Revision of the September 2020 Risk Evaluation

A. Why is EPA proposing to revise the risk determination for the HBCD risk evaluation?

EPA is proposing to revise the risk determination for the HBCD risk evaluation pursuant to TSCA section 6(b) and consistent with Executive Order 13990, (Ref 2) and other Administration priorities (Refs. 1, 3, and 4). EPA plans to consider revising specific aspects of the first ten TSCA existing chemical risk evaluations in order to ensure that the risk evaluations better align with TSCA's objective of protecting health and the environment. For the HBCD risk evaluation, this includes the proposed revisions: (1) Making the risk determination in this instance based on the whole chemical approach instead of by individual conditions of use and (2) emphasizing that EPA does not rely on the assumed use of PPE when making the risk determination.

B. What are the draft revisions?

EPA is releasing a draft revision of the risk determination for the HBCD Risk Evaluation pursuant to TSCA section 6(b). Under the revised determination, EPA proposes to conclude that HBCD, as evaluated in the risk evaluation as a whole, presents an unreasonable risk of injury to health and environment when evaluated under its conditions of use. This revision would replace the previous unreasonable risk determinations made for HBCD by individual conditions of use, supersede the determinations (and withdraw the associated order) of no unreasonable risk for the conditions of use identified in the no unreasonable risk order, and clarify the lack of reliance on assumed use of PPE as part of the risk determination.

These draft revisions do not alter any of the underlying technical or scientific information that informs the risk characterization, and as such the hazard, exposure, and risk characterization sections are not changed. The discussion of the issues in this Notice and in the accompanying draft revision to the risk determination would supersede any conflicting statements in the prior executive summary from the HBCD risk evaluation and the response to comments document (*Summary of External Peer Review and Public Comments and Disposition for HBCD*). Additional policy changes to other chemical risk evaluations, including any proposed consideration of potentially exposed and susceptible subpopulations and/or inclusion of additional exposure pathways, are not necessarily reflected in these draft revisions to the risk determination.

C. Will the draft revised risk determination be peer reviewed?

The risk determination (Section 5 of this Risk Evaluation) was not part of the scope of the Science Advisory Committee on Chemicals (SACC) peer reviews of the first ten priority chemicals. Thus, consistent with that approach, EPA does not intend to conduct peer review for the draft revised unreasonable risk determination for the HBCD risk evaluation because no technical or scientific changes will be made to the hazard or exposure assessments or the risk characterization.

D. What are the next steps for finalizing revisions to the risk determination?

EPA will review and consider public comment received on the draft revised risk determination for the HBCD risk evaluation and, after considering those public comments, issue the revised final HBCD risk determination. If finalized as proposed, EPA would also issue a new order to withdraw the TSCA Section 6(i)(1) no unreasonable risk order issued in Section 5.4.1 of the 2020 HBCD risk evaluation. This final revised risk determination would supersede the September 2020 risk determinations of no unreasonable risk. Consistent with the statutory requirements of section 6(a), the Agency would then propose risk management actions to address the unreasonable risk determined in the HBCD risk evaluation.

IV. References

The following is a listing of the documents that are specifically referenced in this document. The docket includes these documents and other information considered by EPA, including documents that are referenced within the documents that are included in the docket, even if the referenced document is not physically located in the docket. For assistance in locating these other documents, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

1. Executive Order 13985. Advancing Racial Equity and Support for Underserved Communities Through the Federal Government. **Federal Register** (86 FR 7009, January 25, 2021).

2. Executive Order 13990. Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis. **Federal Register** (86 FR 7037, January 25, 2021).

3. Executive Order 14008. Tackling the Climate Crisis at Home and Abroad.

Federal Register (86 FR 7619, February 1, 2021).

4. Presidential Memorandum. Memorandum on Restoring Trust in Government Through Scientific Integrity and Evidence-Based Policymaking. **Federal Register** (86 FR 8845, February 10, 2021).

5. EPA. Proposed Rule; Procedures for Chemical Risk Evaluation Under the Amended Toxic Substances Control Act. **Federal Register** (82 FR 7562, January 19, 2017) (FRL–9957–75).

6. EPA. Final Rule; Procedures for Chemical Risk Evaluation Under the Amended Toxic Substances Control Act. **Federal Register** (82 FR 33726, July 20, 2017) (FRL–9964–38).

Authority: 15 U.S.C. 2601 *et seq.*

Michael S. Regan,

Administrator.

[FR Doc. 2021–28231 Filed 12–28–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2021–0254; FRL–9347–01–OCSPP]

Asbestos Part 2: Supplemental Evaluation Including Legacy Uses and Associated Disposals of Asbestos; Draft Scope of the Risk Evaluation To Be Conducted Under the Toxic Substances Control Act; Notice of Availability and Request for Comments

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In accordance with implementing regulations for the Toxic Substances Control Act (TSCA), the Environmental Protection Agency (EPA) is announcing the availability of and soliciting public comment on the draft scope of the Risk Evaluation for Asbestos Part 2: Supplemental Evaluation Including Legacy Uses and Associated Disposals of Asbestos. In the Part 2 risk evaluation for asbestos, EPA will evaluate the conditions of use of asbestos (including other types of asbestos fibers in addition to chrysotile) that EPA had excluded from Part 1 as legacy uses and associated disposals, as well as any conditions of use of asbestos in talc and talc-containing products. The draft scope for this chemical substance includes the conditions of use, hazards, exposures, and the potentially exposed or susceptible subpopulations that EPA plans to consider in conducting the risk evaluation for this chemical substance. EPA is also opening a 45-calendar day comment period on the draft scope to allow for the public to provide additional data or information that could be useful to the Agency in finalizing the scope of the risk evaluation; comments may be submitted to this docket.

DATES: Comments must be received on or before February 14, 2022.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2021–0254, through the Federal eRulemaking Portal at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets/about-epa-dockets.*

Due to the public health concerns related to COVID–19, the EPA Docket Center (EPA/DC) and Reading Room is open to visitors by appointment only. 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: *For technical information contact:* Peter Gimlin, Existing Chemical Risk Management Division, Office of Pollution Prevention and Toxics, Environmental Protection Agency (Mailcode 7404T), 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 566–0515; email address: *gimlin.peter@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general and may be of interest to entities that manufacture (including import) a chemical substance regulated under TSCA, 15 U.S.C. 2601 *et seq.,* (*e.g.,* entities identified under North American Industrial Classification System (NAICS) codes 325 and 324110). The action may also be of interest to chemical processors, distributors in commerce, and users; non-governmental organizations in the environmental and public health sectors; state and local government agencies; and members of the public. Since other entities may also be interested, the Agency has not attempted to describe all the specific entities and corresponding NAICS codes for entities that may be interested in or affected by this action.

B. What is the Agency's authority for taking this action?

The draft scope of the risk evaluation is issued pursuant to TSCA section 6(b) and TSCA implementing regulations at 40 CFR 702.41(c)(7).

C. What action is the Agency taking?

EPA is publishing and requesting public comment on the draft scope of the Risk Evaluation under TSCA for Asbestos Part 2: Supplemental Evaluation Including Legacy Uses and Associated Disposals of Asbestos. Through the risk evaluation process, EPA will determine whether the chemical substance presents an unreasonable risk of injury to health or the environment under the conditions of use, as determined by the Administrator, in accordance with TSCA section 6(b)(4).

II. Background

Following EPA's June 2016 designation of Asbestos as one the first ten chemicals to undergo risk evaluation under TSCA, EPA initially focused the risk evaluation for asbestos on chrysotile asbestos as this is the only asbestos fiber type that is currently imported, processed, or distributed in the U.S. However, in late 2019, the court in *Safer Chemicals, Healthy Families* v. *EPA,* 943 F.3d 397 (9th Cir. 2019) held that EPA's Risk Evaluation Rule (82 FR 33726, July 20, 2017) (FRL–9964–38) and codified at 40 CFR part 702, subpart B, should not have excluded ''legacy uses'' (*i.e.,* uses without ongoing or prospective manufacturing, processing, or distribution) or ''associated disposals'' (*i.e.,* future disposal of legacy uses) from the definition of conditions of use, although the court did uphold EPA's exclusion of ''legacy disposals'' (*i.e.,* past disposal). Following this court ruling, EPA continued development of the risk evaluation focused on chrysotile asbestos and determined that the complete risk evaluation for asbestos would be issued in two parts. The Risk Evaluation for Asbestos Part 1: Chrysotile Asbestos was released in December 2020 (86 FR 89, January 4, 2021) (FRL–10017–47), allowing the Agency to expeditiously move into risk management for the unreasonable risk identified in Part 1. Under the consent decree in the case *Asbestos Disease*

Awareness Organization et al v. *Regan et al,* 4:21–cv–03716 (N.D. Cal.) EPA is required to publish a final Part 2 Risk Evaluation for Asbestos on or before December 1, 2024. The draft scope of the Risk Evaluation for Asbestos Part 2 is the subject of this notice.

The purpose of a risk evaluation is to determine whether a chemical substance, or group of chemical substances, presents an unreasonable risk to health or the environment, under the conditions of use, including an unreasonable risk to a relevant potentially exposed or susceptible subpopulation (15 U.S.C. 2605(b)(4)(A)). As part of this process, EPA must evaluate both hazards and exposures for the conditions of use; describe whether aggregate or sentinel exposures were considered and the basis for consideration; not consider costs or other non-risk factors; take into account where relevant, likely duration, intensity, frequency, and number of exposures; and describe the weight-of-scientific-evidence for hazards and exposures (15 U.S.C. 2605(b)(4)(F)). This process will culminate in a determination of whether or not the chemical substance presents an unreasonable risk of injury to health or the environment under the conditions of use (15 U.S.C. 2605(b)(4)(A); 40 CFR 702.47).

III. Draft Scope of the Risk Evaluation for Asbestos Part 2: Supplemental Evaluation Including Legacy Uses and Associated Disposals of Asbestos

EPA is publishing the draft scope of the Risk Evaluation for Asbestos Part 2: Supplemental Evaluation Including Legacy Uses and Associated Disposals of Asbestos. For the purposes of scoping and risk evaluation, EPA has adopted the definition of asbestos as defined by TSCA Title II (added to TSCA in 1986), Section 202 as the ''asbestiform varieties of six fiber types—chrysotile (serpentine), crocidolite (riebeckite), amosite (cummingtonite-grunerite), anthophyllite, tremolite or actinolite.'' The latter five fiber types are amphibole varieties. Given that Part 2 of the risk evaluation will focus on legacy uses of asbestos and associated disposals, a unique consideration will be vermiculite, which was widely used in building materials in the past and was co-located with Libby Amphibole Asbestos (LAA; and its tremolite, winchite, and richterite constituents). Thus, LAA (and its tremolite, winchite, and richterite constituents) will be considered in Part 2 of the risk evaluation. Additionally, another commercially mined substance, talc, has been implicated as a potential source of asbestos exposure. Talc can also be co-located geologically with asbestos, where asbestos can remain in small or trace amounts following extraction. Thus, EPA will determine the relevant conditions of use of talc, including but not limited to any ''legacy use'' and ''associated disposal'', where asbestos is implicated. The draft scope of the risk evaluation for this asbestos Part 2 includes the conditions of use, hazards, exposures, and the potentially exposed or susceptible subpopulations EPA plans to consider in the risk evaluation (15 U.S.C. 2605(b)(4)(D)). Development of the scope is the first step of a risk evaluation. The draft scope of the risk evaluation will include the following components (40 CFR 702.41(c)):

- The conditions of use, as determined by the Administrator, that EPA plans to consider in the risk evaluation.
- The potentially exposed populations that EPA plans to evaluate; the ecological receptors that EPA plans to evaluate; and the hazards to health and the environment that EPA plans to evaluate.
- A description of the reasonably available information and the science approaches that the Agency plans to use.
- A conceptual model that will describe the actual or predicted relationships between the chemical substance, the conditions of use within the scope of the evaluation and the receptors, either human or environmental, with consideration of the life cycle of the chemical substance—from manufacturing, processing, distribution in commerce, storage, use, to release or disposal—and identification of human and ecological health hazards EPA plans to evaluate for the exposure scenarios EPA plans to evaluate.
- An analysis plan, which will identify the approaches and methods EPA plans to use to assess exposure, hazards, and risk, including associated uncertainty and variability, as well as a strategy for using reasonably available information and science approaches.
- A plan for peer review.

EPA encourages commenters to provide information they believe might be missing or may further inform the risk evaluation.

Authority: 15 U.S.C. 2601 *et seq.*

Michael S. Regan,

Administrator.

[FR Doc. 2021–28230 Filed 12–28–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–ORD–2015–0467; FRL–9390–01–ORD]

Board of Scientific Counselors (BOSC) Safe and Sustainable Water Resources Subcommittee Meeting—January 2022

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of public meeting.

SUMMARY: The Environmental Protection Agency (EPA), Office of Research and Development (ORD), gives notice of a virtual meeting of the Board of Scientific Counselors (BOSC) Safe and Sustainable Water Resources (SSWR) Subcommittee to deliberate on their report of nutrients and harmful algal blooms research.

DATES: The meeting will be held over one day via videoconference: Thursday, January 13, 2022, from 11 a.m. to 2 p.m. (EDT).

Attendees must register by January 12, 2022.

Meeting time is subject to change. This meeting is open to the public. Comments must be received by January 12, 2022, to be considered by the subcommittee. Requests for the draft agenda or making a presentation at the meeting will be accepted until January 12, 2022.

ADDRESSES: Instructions on how to connect to the videoconference will be provided upon registration at: *https://epa-bosc-sswr-subcommittee-mtg.eventbrite.com.*

Submit your comments to Docket ID No. EPA–HQ–ORD–2015–0467 by one of the following methods:

- *www.regulations.gov:* Follow the online instructions for submitting comments.
- *Note:* Comments submitted to the *www.regulations.gov* website are anonymous unless identifying information is included in the body of the comment.
- *Email:* Send comments by electronic mail (email) to: *ORD.Docket@epa.gov,* Attention Docket ID No. EPA–HQ–ORD–2015–0467.
- *Note:* Comments submitted via email are not anonymous. The sender's email will be included in the body of the comment and placed in the public docket which is made available on the internet.

Instructions: All comments received, including any personal information provided, will be included in the public docket without change and may be made available online at *www.regulations.gov.* Information

claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute will not be included in the public docket and should not be submitted through *www.regulations.gov* or email. For additional information about the EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/dockets/.Public Docket:* Publicly available docket materials may be accessed Online at *www.regulations.gov.*

Copyrighted materials in the docket are only available via hard copy. The telephone number for the ORD Docket Center is (202) 566–1752.

FOR FURTHER INFORMATION CONTACT: The Designated Federal Officer (DFO), Tom Tracy, via phone/voicemail at: 919–541–4334; or via email at: *tracy.tom@epa.gov.*

Any member of the public interested in receiving a draft agenda, attending the meeting, or making a presentation at the meeting should contact Tom Tracy no later than January 12, 2022.

SUPPLEMENTARY INFORMATION: The Board of Scientific Counselors (BOSC) is a federal advisory committee that provides advice and recommendations to EPA's Office of Research and Development on technical and management issues of its research programs. The meeting agenda and materials will be posted to *https://www.epa.gov/bosc.*

Proposed agenda items for the meeting include, but are not limited to, the following: Nutrients and harmful algal blooms.

Information on Services Available: For information on translation services, access, or services for individuals with disabilities, please contact Tom Tracy at 919–541–4334 or *tracy.tom@epa.gov.* To request accommodation of a disability, please contact Tom Tracy at least ten days prior to the meeting to give the EPA adequate time to process your request.

Authority: Pub. L. 92–463, 1, Oct. 6, 1972, 86 Stat. 770.

Kathleen Deener,

Acting Deputy Director, Office of Science Advisor, Policy and Engagement.

[FR Doc. 2021–28306 Filed 12–28–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2016–0546; FRL—9388–01–OMS]

Information Collection Request Submitted to OMB for Review and Approval; Comment Request; Aircraft Engines—Supplemental Information Related To Exhaust Emissions (Renewal)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) has submitted an information collection request (ICR), Aircraft Engines—Supplemental Information Related to Exhaust Emissions (EPA ICR Number 2427.06, OMB Control Number 2060–0680), to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This is a proposed extension of the ICR, which is currently approved through December 31, 2021. Public comments were previously requested on this ICR renewal via the **Federal Register** on May 7, 2021. This notice allows for an additional 30 days for public comments. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Comments must be submitted on or before January 28, 2022.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA–HQ–OAR–2016–0546, online using *www.regulations.gov* (our preferred method) or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI), or other information whose disclosure is restricted by statute.

Submit written comments and recommendations to OMB for the proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Cullen Leggett, Office of Transportation and Air Quality, Office of Air and Radiation, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (734) 214–4514; fax number: (734) 214–4816; email address: *leggett.cullen@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents, which explain in detail the information that the EPA will be collecting, are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *https://www.epa.gov/dockets.*

Abstract: This information collection is being conducted by the Environmental Protection Agency's (EPA's) Office of Air and Radiation (OAR) pursuant to section 114 of the Clean Air Act, as amended (CAA or the Act) to assist the Administrator of EPA in developing emissions standards and/or to inform future policy making decisions for aircraft gas turbine engines pursuant to section 231 of the Act.

Under CAA section 231, the EPA is responsible for establishing standards for emissions from aircraft engines, and under CAA section 232, the Federal Aviation Administration (FAA) is responsible for enforcing these standards. The EPA and the FAA traditionally work within the standard-setting process of the International Civil Aviation Organization (ICAO) to establish international emission standards and related requirements, which individual nations later adopt into domestic law in fulfillment of their obligations under the Convention on International Civil Aviation (Chicago Convention).[1] Historically, international emission standards have first been adopted by ICAO, and subsequently the EPA has initiated rulemakings under CAA section 231 to establish domestic standards that are at least as stringent as ICAO's standards.

The EPA is not proposing to apply this renewed reporting requirement to any additional respondents. For individual gaseous Landing and Take-Off (LTO) test points, the EPA proposes to change reporting from total mass over

[1] ICAO, 2006: *Convention on International Civil Aviation, Ninth Edition,* Document 7300/9, 114 pp. Available at: *http://www.icao.int/publications/Documents/7300_9ed.pdf* (last accessed March 31, 2021).

the test point to emissions index (pollutant mass per unit of fuel burn).

The EPA is also expanding the scope of this ICR to include supersonic aircraft engines in addition to subsonic aircraft engines. When this ICR was established and previously renewed, the only aircraft engines that were in production, in development, or in use were subsonic engines. Thus, the EPA only included subsonic engines and only referred to subsonic test procedures. Yet, standards in 40 CFR part 87 (Control of Air Pollution from Aircraft and Aircraft Engines) apply to both subsonic and supersonic aircraft engines. The EPA is expanding this ICR to apply equally to all engines (subsonic and supersonic aircraft engines) that are required to meet standards under Part 87. The EPA is not expecting any supersonic engines to be certified by the FAA in the three-year period covered by this ICR. However, in the event there are, the EPA wants to ensure it has access to this new emissions information in an expeditious manner so that the agency can understand the environmental impacts and inform any appropriate future standard setting activities under CAA section 231. The inclusion of supersonic engines would not expand the number of respondents; nor would it place any additional burden on the manufactures because the EPA is only requesting data related to standards under Part 87.

Form Numbers: EPA Form 5900–223.

Respondents/affected entities: Aircraft Engine and Engine Parts Manufacturers.

Respondent's obligation to respond: Mandatory (pursuant to section 114 of the Clean Air Act).

Estimated number of respondents: 7 (total).

Frequency of response: Annual.

Total estimated burden: 285 (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $20,990 (per year), which includes no annualized capital or operation & maintenance costs.

Changes in Estimates: There is decrease of 217 hours in the total estimated respondent burden compared with the ICR currently approved by OMB. This decrease is due to one-time start-up costs to conduct nvPM measurements from jet engines that were included in the previous ICR renewal. The initial cost for manufacturers was capital and labor intensive. These one-time costs were incurred in the past 3 years and are not expected to need to be repeated for these engines now that the data has been collected. If manufacturers develop a new subsonic engine with a thrust greater than 26.7kN, the nvPM measurements will need to be verified by the FAA. The introduction of new aircraft engines does not happen on a very frequent basis. The EPA is estimating that each manufacturer may introduce one subsonic engine over 26.7kN over the next three years, for a total of 6 engines (compared to an estimated 33 engines in the previous ICR).

Courtney Kerwin,

Director, Regulatory Support Division.

[FR Doc. 2021–28253 Filed 12–28–21; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0175; OMB 3060–0707; FR ID 64790]

Information Collections Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before February 28, 2022. If you anticipate that you will be submitting comments but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email to *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0175.

Title: Section 73.1250, Broadcasting Emergency Information.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 50 respondents; 50 responses.

Estimated Time per Response: 1 hour.

Frequency of Response: On occasion reporting requirement.

Total Annual Burden: 50 hours.

Total Annual Cost: None.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection is contained in Section 154(i) of the Communications Act of 1934, as amended.

Needs and Uses: The information collection contained in 47 CFR 73.1250(e) state immediately upon cessation of an emergency during which broadcast facilities were used for the transmission of point-to-point messages under paragraph (b) of this section, or when daytime facilities were used during nighttime hours by an AM station in accordance with paragraph (f) of this section, a report in letter form shall be forwarded to the FCC in Washington, DC, setting forth the nature of the emergency, the dates and hours of the broadcasting of emergency information, and a brief description of the material carried during the emergency. A certification of compliance with the non-commercialization provision of paragraph (f) of this section must accompany the report where daytime facilities are used during nighttime hours by an AM station, together with a detailed showing, under the provisions of that paragraph, that no other broadcast service existed or was adequate.

OMB Control Number: 3060–0707.

Title: Over-the-Air Reception Devices (OTARD).

Type of Review: Extension of a currently approved collection.

Respondents: State or Local, or Tribal Government.

Number of Respondents and Responses: 77 respondents; 77 responses.

Estimated Time per Response: 2–6 hours.

Frequency of Response: On occasion reporting; third party disclosure.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection of information is contained in Section 207 of the Communications Act of 1934, as amended.

Total Annual Burden: 288 hours.

Total Annual Cost: 17,100.

Needs and Uses: Section 207 of the Telecommunications Act of 1996 (''1996 Act'') directs the Commission to promulgate rules prohibiting restrictions on viewers' ability to receive over-the-air signals by television broadcast, multichannel multipoint distribution, or direct broadcast satellite services.

In a Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, CS Docket No. 96–83, FCC 96–328, released August 6, 1996, the Commission fully implemented Section 207 of the 1996 Act by adopting final rules for a preemption of state, local and non-governmental regulations that impair viewers ability to receive over-the-air signals. In doing so, the FCC acknowledged the necessity of allowing state, local and non-governmental entities to continue to enforce certain regulations and restrictions, such as those serving safety purposes, and therefore exempted them from its prohibition. Also, state, local and non-governmental entities were permitted to file petitions for waivers.

On September 25, 1998, the Commission released an Order on Reconsideration, FCC 98–214, in this proceeding that further modified and clarified Section 207 rules. Among other things, the Order on Reconsideration clarified how declaratory rulings and waivers in this matter are to be served on all interested parties. If a local government seeks a declaratory ruling or a waiver, it must take steps to afford reasonable, constructive notice to residents in its jurisdiction (*e.g.,* by placing notices in a local newspaper of general circulation). Certificates of service and proof of constructive notice also must be provided to the Commission with the petition.

In this regard, the petitioner should provide the Commission with a copy of the notice and an explanation of where the notice was placed and how many people the notice might reasonably have reached. Effective January 22, 1999, FCC 98–273, the Commission amended the rules so that it applies to rental property where the renter has an exclusive use area, such as a balcony or patio.

In FCC 00–366, the Commission then further amended the rule so that it applies to customer-end antennas that receive and transmit fixed wireless signals. This amendment became effective on May 25, 2001.

Federal Communications Commission.

Katura Jackson,

Federal Register Liaison Officer.

[FR Doc. 2021–28289 Filed 12–28–21; 8:45 am]

BILLING CODE 6712–01–P904

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1088; FR ID 64811]

Information Collections Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before February 28, 2022. If you anticipate that you will be submitting comments but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email to *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1088.

Title: Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, Report and Order and Third Order on Reconsideration, CG Docket No. 05–338, FCC 06–42.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit institutions; and Individuals or households.

Number of Respondents and Responses: 5,340,000 respondents; 6,050,905 responses.

Estimated Time per Response: 3 minutes (.05 hours) to 30 minutes (.50 hours).

Frequency of Response: Annual, monthly, and on occasion reporting requirements; Recordkeeping; and Third party disclosure.

Obligation to Respond: Required to obtain or retain benefits. The authorizing statutes for this information collection are: Telephone Consumer Protection Act of 1991, Public Law 102–243. 105 Stat. 2394 (1991); Junk Fax Prevention Act, Public Law 109–21, 119 Stat. 359 (2005).

Total Annual Burden: 3,670,625 hours.

Total Annual Cost: $1,062,142.

Needs and Uses: On April 5, 2006, the Commission adopted a Report and Order and Third Order on Reconsideration, In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005, CG Docket Nos. 02–278 and 05–338, FCC 06–42, which modified the Commission's facsimile advertising rules to implement the Junk Fax Prevention Act. The Report and Order and Third Order on Reconsideration contained information collection requirements pertaining to: (1) Opt-out Notice and Do-Not-Fax Requests

Recordkeeping in which the rules require senders of unsolicited facsimile advertisements to include a notice on the first page of the facsimile that informs the recipient of the ability and means to request that they not receive future unsolicited facsimile advertisements from the sender; (2) Established Business Relationship Recordkeeping whereas the Junk Fax Prevention Act provides that the sender, *e.g.,* a person, business, or a nonprofit/institution, is prohibited from faxing an unsolicited advertisement to a facsimile machine unless the sender has an ''established business relationship'' (EBR) with the recipient; (3) Facsimile Number Recordkeeping in which the Junk Fax Prevention Act provides that an EBR alone does not entitle a sender to fax an advertisement to an individual or business. The fax number must also be provided voluntarily by the recipient; and (4) Express Invitation or Permission Recordkeeping where in the absence of an EBR, the sender must obtain the prior express invitation or permission from the consumer before sending the facsimile advertisement.

On October 14, 2008, the Commission released an Order on Reconsideration, FCC 08–239, addressing certain issues raised in petitions for reconsideration and/or clarification filed in response to the Commission's Report and Order and Third Order on Reconsideration (Junk Fax Order), FCC 06–42. In document FCC 08–239, the Commission clarified that: (1) Facsimile numbers compiled by third parties on behalf of the facsimile sender will be presumed to have been made voluntarily available for public distribution so long as they are obtained from the intended recipient's own directory, advertisement, or Internet site; (2) Reasonable steps to verify that a recipient has agreed to make available a facsimile number for public distribution may include methods other than direct contact with the recipient; and (3) a description of the facsimile sender's opt-out mechanism on the first web page to which recipients are directed in the opt-out notice satisfies the requirement that such a description appear on the first page of the website.

The Commission believes these clarifications will assist senders of facsimile advertisements in complying with the Commission's rules in a manner that minimizes regulatory compliance costs while maintaining the protections afforded consumers under the Telephone Consumer Protection Act (TCPA).

Federal Communications Commission.

Katura Jackson,

Federal Register Liaison, Office of the Secretary.

[FR Doc. 2021–28290 Filed 12–28–21; 8:45 am]

BILLING CODE 6712–01–P913

FEDERAL MARITIME COMMISSION

Notice of Agreement Filed

The Commission hereby gives notice of the filing of the following agreement under the Shipping Act of 1984. Interested parties may submit comments, relevant information, or documents regarding the agreement to the Secretary by email at *Secretary@fmc.gov,* or by mail, Federal Maritime Commission, Washington, DC 20573. Comments will be most helpful to the Commission if received within 12 days of the date this notice appears in the **Federal Register**. Copies of agreement are available through the Commission's website (*www.fmc.gov*) or by contacting the Office of Agreements at (202)–523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 201348–002.

Agreement Name: APL/SWIRE Guam, Saipan—S. Korea, Japan Slot Charter Agreement.

Parties: American President Lines, LLC and Swire Shipping Pte. Ltd.

Filing Party: Conte Cicala; Clyde & Co. US LLP.

Synopsis: The amendment changes the name of Swire Shipping.

Proposed Effective Date: 12/20/2021.

Location: https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/34502.

Agreement No.: 201275–002.

Agreement Name: NBP/SSL Pacific-Asia Slot Charter Agreement.

Parties: NYK Bulk & Project Carriers Ltd. and Swire Shipping Pte. Ltd.

Filing Party: Conte Cicala; Clyde & Co. US LLP.

Synopsis: The amendment changes the name of Swire Shipping.

Proposed Effective Date: 12/20/2021.

Location: https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/16287.

Dated: December 23, 2021.

JoAnne O'Bryant,

Program Analyst.

[FR Doc. 2021–28272 Filed 12–28–21; 8:45 am]

BILLING CODE 6730–02–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)).

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than January 27, 2022.

A. *Federal Reserve Bank of Richmond* (Adam M. Drimer, Assistant Vice President) 701 East Byrd Street, Richmond, Virginia 23219. Comments can also be sent electronically to or *Comments.applications@rich.frb.org:*

1. *Lee Bankshares, Inc., Pennington Gap, Virginia;* to become a bank holding company by acquiring Lee Bank and Trust Company, also of Pennington Gap, Virginia.

Board of Governors of the Federal Reserve System, December 23, 2021.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2021–28301 Filed 12–28–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–2002–N–0314; FDA–2018–N–0405; FDA–2018–N–0270; and FDA–2021–N–0359]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approvals

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is publishing a list of information collections that have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Ila S. Mizrachi, Office of Operations, Food and Drug Administration, Three White Flint North, 10 a.m.–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–7726, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: The following is a list of FDA information collections recently approved by OMB under section 3507 of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507). The OMB control number and expiration date of OMB approval for each information collection are shown in table 1. Copies of the supporting statements for the information collections are available on the internet at *http://www.reginfo.gov/public/do/PRAMain.* 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.

TABLE 1—LIST OF INFORMATION COLLECTIONS APPROVED BY OMB

Title of collection	OMB control number	Date approval expires
Request for Samples and Protocols	0910–0206	9/30/2024
Medical Device Recall Authority	0910–0432	9/30/2024
Survey on the Occurrence of Foodborne Illness Risk Factors in Selected Institutional Foodservice and Retail Food Stores Facility Types	0910–0799	9/30/2024
Human Drug Compounding, Repackaging and Related Activities Regarding Sections 503A and 503B of the Federal Food, Drug, and Cosmetic Act	0910–0858	9/30/2024

Dated: December 22, 2021.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2021–28299 Filed 12–28–21; 8:45 am]

BILLING CODE 4164–01–P782

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–1529]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Reclassification Petitions for Medical Devices

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or we) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Submit written comments (including recommendations) on the collection of information by January 28, 2022.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be submitted to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. The OMB control number for this information collection is 0910–0138. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Domini Bean, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–5733, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Reclassification Petitions for Medical Devices

OMB Control Number 0910–0138—Extension

The Federal Food, Drug, and Cosmetic Act (FD&C Act) establishes the following three categories (classes) of devices, reflecting the regulatory controls needed to provide reasonable assurance of their safety and effectiveness: Class I (general controls), class II (special controls), and class III (premarket approval) (section 513(a)(1) of the FD&C Act (21 U.S.C. 360c(a)(1)). To change a device classification, FDA can initiate a reclassification, or an interested person can petition FDA to reclassify a device based on new information (section 513(e) of the FD&C Act). On July 9, 2012, the Food and Drug Administration Safety and Innovation Act (FDASIA) was enacted, changing the reclassification process under section 513(e) of the FD&C Act from rulemaking to an administrative order process. To reclassify a device under section 513(e) of the FD&C Act, FDA must do the following before making the reclassification final: (1) Publish a proposed order in the **Federal Register** that includes the proposed reclassification and a summary of the valid scientific evidence that supports the reclassification, (2) convene a device classification panel meeting, and (3) consider comments from the relevant public docket.

FDASIA also amended the provisions of the FD&C Act authorizing FDA to require submission of a premarket approval application (PMA) for a preamendments class III device (referred to as a ''call for PMAs''). Preamendments devices are devices that were in commercial distribution before the enactment of the 1976 Amendments. Under the FD&C Act, preamendments devices classified into class III may be marketed upon clearance of a 510(k) submission, and submission of a PMA is not required until FDA has issued a final order requiring premarket approval (section 515(b) of the FD&C Act (21 U.S.C. 360e(b)). As amended by FDASIA, the FD&C Act requires that FDA, in its call for PMAs, publish a proposed order in the **Federal Register**, hold a classification panel meeting, and

consider comments on the proposed order (section 515(b) of the FD&C Act, as amended by FDASIA).

Under the FD&C Act, FDA's call for PMAs must, among other things, contain an opportunity for interested persons to request a change in the classification of the device based on new information (section 515(b)(2) of the FD&C Act). After consideration of comments on the proposed order and findings, FDA must either: (1) Finalize the call for PMAs by issuing an administrative order requiring approval of a PMA and publishing in the **Federal Register** findings with respect to: (i) The degree of risk of illness or injury designed to be eliminated or reduced by requiring the device to have an approved PMA or a declared completed product development protocol and (ii) the benefit to the public from the use of the device; or (2) publish a notice in the **Federal Register** terminating the proceeding and initiate a reclassification proceeding based on new information (section 515(b)(3) of the FD&C Act, as amended by FDASIA; see section 513(e) of the FD&C Act).

The FD&C Act, as amended by FDASIA, now requires the use of administrative orders, rather than rulemaking, when FDA calls for PMAs for a preamendments device remaining in class III (section 515(b) of the FD&C Act, as amended by FDASIA).

FDA refers to a device that was not in commercial distribution before the 1976 Amendments as a postamendments device. Postamendments devices are classified automatically into class III by statute, without any rulemaking process (section 513(f)(1) of the FD&C Act). A postamendments device remains in class III and is subject to the PMA requirements unless and until: (1) FDA reclassifies the device into class I or II; (2) FDA issues an order classifying the device into class I or II via the De Novo classification process (see section 513(f)(2) of the FD&C Act); or (3) FDA issues an order finding the device to be substantially equivalent to a predicate device that does not require the filing of a PMA (see section 513(i) of the FD&C Act).

FDA may initiate, or the manufacturer or importer of a device may petition for, the reclassification of a postamendments device classified into class III by operation of law (section 513(f)(3) of the FD&C Act). This FDA-initiated reclassification process consists of a proposed reclassification order, optional panel consultation, and a final reclassification order published in the **Federal Register** following consideration of comments and any panel recommendations or comments (§ 860.134(c) (21 CFR 860.134(c))). The reclassification order may, as appropriate, establish special controls to provide reasonable assurance of the safety and effectiveness of the device (§ 860.134(d)).

Under the 1976 Amendments, Congress classified all those devices previously regulated as new drugs into class III (generally referred to as transitional devices). Under the FD&C Act, FDA may initiate, or the manufacturer or importer of a device may petition for, the reclassification of a transitional device remaining in class III (section 520(l)(2) of the FD&C Act (21 U.S.C. 360j(l)(2)). The process for reclassification of transitional devices initiated by FDA is detailed in 21 CFR ?860.136(c). This process consists of a proposed reclassification order, optional panel consultation, and a final reclassification order published in the **Federal Register** following consideration of comments and any panel recommendations or comments.

In the **Federal Register** of September 7, 2021 (86 FR 50132), we published a 60-day notice requesting public comment on the proposed collection of information. No comments were received.

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR section; information collection activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
§ 860.123; supporting data for reclassification petitions	6	1	6	497	2,982

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Based on a review of the information collection since our last request for OMB approval, we have made no adjustments to our burden estimate.

Dated: December 22, 2021.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2021–28305 Filed 12–28–21; 8:45 am]

BILLING CODE 4164–01–P917

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

[OMB No. 0906–0066—Extension]

Agency Information Collection Activities: Proposed Collection: Public Comment Request SHIP COVID–19 Testing and Mitigation Program Data Collection

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the requirement for opportunity for public comment on proposed data collection projects of the Paperwork Reduction Act of 1995, HRSA announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, HRSA seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

DATES: Comments on this ICR should be received no later than February 28, 2022.

ADDRESSES: Submit your comments to *paperwork@hrsa.gov* or by mail to the HRSA Information Collection Clearance Officer, Room 14N136B, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email *paperwork@hrsa.gov* or call Samantha Miller, the acting HRSA Information Collection Clearance Officer at (301) 443–9094.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the information collection request title for reference.

Information Collection Request Title: Small Rural Hospital Improvement Program (SHIP) COVID–19 Testing and Mitigation Program Data Collection OMB No. 0906–0066—Extension.

Abstract: The American Rescue Plan Act of 2021 (Pub. L. 117–2) provided one-time funding for awards that will be carried out under Section 711 of the Social Security Act (42 U.S.C. 912(b)(5)). The SHIP is requesting an extension of an information collection request. State grantees will improve health care in rural areas by using the funding to provide support to eligible rural hospitals to increase COVID–19 testing efforts, expand access to testing in rural communities, and expand the range of mitigation activities.

Need and Proposed Use of the Information: The terms and conditions for this program specify that, ''hospitals will be required to report on the number of tests provided and categories in which the funding is spent.'' The data will allow HRSA to ensure SHIP COVID–19 recipients are meeting the terms and conditions of their funding, while providing HRSA with information on the effectiveness of funds distributed through this program.

Likely Respondents: The respondents will be hospital staff and designated Representatives, and State Office of Rural Health Staff.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose, or provide the information requested. 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. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Number of respondents per respondent	Total responses	Average burden per response (in hours)	Total burden hours
SHIP COVID–19 Testing and Mitigation Data Reporting.	1,540 Number of unique organizations funded through the program.	6 Reported on a quarterly basis during the 18 month program or until the end of the public health emergency (whichever is first).	9,240	.25	2,310 Total hours spend on responses for all funded organization over a 2-year period.
	1,540		9,240		2,310

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2021–28268 Filed 12–28–21; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The cooperative agreement applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the cooperative agreement applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Initial Review Group; Neurological Sciences and Disorders C Study Section Translational Neural, Brain, and Pain Relief Devices.

Date: February 8–9, 2022.

Time: 10:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate cooperative agreement applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Diana M. Cummings, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute of Neurological Disorders and Stroke, NIH, NSC, 6001 Executive Blvd., Suite 3208, Bethesda, MD 20892, *cummingsdi@ninds.nih.gov*.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; NSD–C Member Conflict Special Emphasis Panel.

Date: February 15, 2022.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate cooperative agreement applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Diana M. Cummings, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute of Neurological Disorders and Stroke, NIH, NSC, 6001 Executive Blvd., Suite 3208, Bethesda, MD 20892, *cummingsdi@ninds.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: December 22, 2021.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–28277 Filed 12–28–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Nursing Research; Notice of 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 Council for Nursing Research.

The meeting will be open to the public as indicated below, with attendance limited to space available. The URL link to this meeting is *https://videocast.nih.gov/*. Individuals who plan to attend and 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 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 Council for Nursing Research.

Date: January 25, 2022.

Open: 11:00 a.m. to 4:15 p.m.

Agenda: Discussion of Program Policies and Issues.

Place: National Institute of Nursing Research, National Institutes of Health, 6701 Democracy Boulevard, One Democracy Plaza, Bethesda, MD 20892, *https://videocast.nih.gov/* (Virtual Meeting).

Closed: 4:15 p.m. to 5:00 p.m.

Agenda: To review and evaluate to review and evaluate grant applications.

Place: National Institute of Nursing Research, 6701 Democracy Boulevard, One Democracy Plaza, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Rebekah S. Rasooly, Ph.D., Acting Director, Division of Extramural Science Programs, Branch Chief, Wellness, Technology & Training Branch, National Institute of Nursing Research/NIH, 6701 Democracy Blvd., Bethesda, MD 20817, (301) 827–2599, *rr185i@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.ninr.nih.gov/aboutninr/nacnr*, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.361, Nursing Research, National Institutes of Health, HHS)

Dated: December 22, 2021.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–28275 Filed 12–28–21; 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 Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group; Clinical Neuroimmunology and Brain Tumors Study Section.

Date: January 27–28, 2022.

Time: 9:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications and/or proposals.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Aleksey Gregory Kazantsev, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5201, Bethesda, MD 20817, 301–435–1042, *aleksey.kazantsev@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 22, 2021.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–28276 Filed 12–28–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0102]

Agency Information Collection Activities; Revision of a Currently Approved Collection: Form G–639; Online FOIA Request

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 60-Day notice.

SUMMARY: U.S. Citizenship and Immigration Services (USCIS), the Department of Homeland Security (DHS), invites the general public and other Federal agencies to comment on this proposed revision of a currently approved collection of information. In accordance with the Paperwork Reduction Act (PRA) of 1995, the information collection notice is published in the **Federal Register** to obtain comments regarding the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments.

DATES: Comments are encouraged and will be accepted for 60 days until February 28, 2022.

ADDRESSES: All submissions received must include the OMB Control Number 1615–0102 in the body of the letter, the agency name and Docket ID USCIS–2008–0028. Submit comments via the Federal eRulemaking Portal Website at *https://www.regulations.gov* under e-Docket ID number USCIS–2008–0028.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, telephone number (240) 721–3000 (This is not a toll-free number. Comments are not accepted via telephone message). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS Website at *https://www.uscis.gov,* or call the USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

SUPPLEMENTARY INFORMATION:

Comments

You may access the information collection instrument with instructions

or additional information by visiting the Federal eRulemaking Portal site at: *https://www.regulations.gov* and entering USCIS–2008–0028 in the search box. All submissions will be posted, without change, to the Federal eRulemaking Portal at *https://www.regulations.gov*, and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *https://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

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

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

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Form G–639; Online FOIA Request.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* G–639; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary*: Individuals or households. FOIA requests may be submitted in any written form. However, Form G–639 and the Online FOIA Request process are convenient tools for individuals to provide the data necessary for identification of a particular record requested under FOIA. Submitting a FOIA request via Form G–639 or the Online FOIA Request process ensures expeditious handling of FOIA requests.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form G–639 (paper) is 123,425 and the estimated hour burden per response is 0.67 hours. The estimated total number of respondents for the information collection Online FOIA Request is 123,425 and the estimated hour burden per response is 0.5 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 144,407 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $2,635,124.

Dated: December 23, 2021.

Samantha L. Deshommes,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2021–28323 Filed 12–28–21; 8:45 am]

BILLING CODE 9111–97–P1050

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0107]

Agency Information Collection Activities; Extension, Without Change, of a Currently Approved Collection: H–2 Petitioner's Employment Related or Fee Related Notification

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 30-Day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The purpose of this notice is to allow an additional 30 days for public comments.

DATES: Comments are encouraged and will be accepted until January 28, 2022.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, must be submitted via the Federal eRulemaking Portal website at *http://www.regulations.gov* under e-Docket ID number USCIS–2009–0015. All submissions received must include the OMB Control Number 1615–0107 in the body of the letter, the agency name and Docket ID USCIS–2009–0015.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, Telephone number (240) 721–3000 (This is not a toll-free number; comments are not accepted via telephone message.). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *http://www.uscis.gov,* or call the USCIS Contact Center at (800) 375–5283; TTY (800) 767–1833.

SUPPLEMENTARY INFORMATION:

Comments

The information collection notice was previously published in the **Federal Register** on September 20, 2021, at 86 FR 52167, allowing for a 60-day public comment period. USCIS received two comments in connection with the 60-day notice.

You may access the information collection instrument with instructions, or additional information by visiting the Federal eRulemaking Portal site at: *http://www.regulations.gov* and enter USCIS–2009–0015 in the search box. The comments submitted to USCIS via this method are visible to the Office of Management and Budget and comply with the requirements of 5 CFR 1320.12(c). All submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information,

please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used

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

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

Overview of This Information Collection

(1) *Type of Information Collection Request:* Extension, Without Change, of a Currently Approved Collection.

(2) *Title of the Form/Collection:* H–2 Petitioner's Employment-Related or Fee-Related Notification.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* No form number; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Business or other for-profit. The notification requirement is necessary to ensure that noncitizen workers maintain their nonimmigrant status and will help prevent H–2 workers from engaging in unauthorized employment.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection H–2 Petitioner's Employment Related or Fee Related Notification is 1,700 and the estimated hour burden per response is 0.5 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 850 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $8,500.

Dated: December 22, 2021.

Samantha L. Deshommes,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2021–28239 Filed 12–28–21; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0054]

Agency Information Collection Activities; Extension, Without Change, of a Currently Approved Collection: Notice of Naturalization Oath Ceremony

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 60-Day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) invites the general public and other Federal agencies to comment upon this proposed extension of a currently approved collection of information. In accordance with the Paperwork Reduction Act (PRA) of 1995, the information collection notice is published in the **Federal Register** to obtain comments regarding the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments.

DATES: Comments are encouraged and will be accepted for 60 days until February 28, 2022.

ADDRESSES: All submissions received must include the OMB Control Number 1615–0054 in the body of the letter, the agency name and Docket ID USCIS–2006–0055. Submit comments via the Federal eRulemaking Portal website at *https://www.regulations.gov* under e–Docket ID number USCIS–2006–0055.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, telephone number (240) 721–3000 (This is not a toll-free number. Comments are not accepted via telephone message). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *https://www.uscis.gov,* or call the USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

SUPPLEMENTARY INFORMATION:

Comments

You may access the information collection instrument with instructions or additional information by visiting the Federal eRulemaking Portal site at: *https://www.regulations.gov* and entering USCIS–2006–0055 in the search box. All submissions will be posted, without change, to the Federal eRulemaking Portal at *https://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *https://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

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

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

Overview of This Information Collection

(1) *Type of Information Collection:* Extension, Without Change, of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Notice of Naturalization Oath Ceremony.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* Form N–445; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. The information furnished on Form N–445 refers to events that may have occurred since the applicant's initial interview and prior to the administration of the oath of allegiance. Several months may elapse between these dates and the information that is provided assists the officer to make and render an appropriate decision on the application. USCIS will use this information to determine if any changes to the respondent's prior statements affect the decisions the agency has made in regard to the respondent's ability to be naturalized.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection N–445 is 741,541 and the estimated hour burden per response is .25 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 185,385 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $0. This document is completed at the naturalization ceremony, there is no cost to submit it.

Dated: December 22, 2021.

Samantha L. Deshommes,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2021–28238 Filed 12–28–21; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0080]

Agency Information Collection Activities; Extension, Without Change, of a Currently Approved Collection: USCIS Case Status Online

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 30-Day notice.

SUMMARY: U.S. Citizenship and Immigration Services (USCIS), the Department of Homeland Security (DHS), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The purpose of this notice is to allow an additional 30 days for public comments.

DATES: Comments are encouraged and will be accepted until January 28, 2022.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, must be submitted via the Federal eRulemaking Portal website at *http://www.regulations.gov* under e-Docket ID number USCIS–2005–0033. All submissions received must include the OMB Control Number 1615–0080 in the body of the letter, the agency name and Docket ID USCIS–2005–0033.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, Telephone number (240) 721–3000 (This is not a toll-free number; comments are not accepted via telephone message.). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *https://www.uscis.gov,* or call the USCIS Contact Center at (800) 375–5283; TTY (800) 767–1833.

SUPPLEMENTARY INFORMATION:

Comments

The information collection notice was previously published in the **Federal Register** on August 12, 2021, at 86 FR 44399, allowing for a 60-day public comment period. USCIS received two comments in connection with this notice.

You may access the information collection instrument with instructions, or additional information by visiting the Federal eRulemaking Portal site at: *http://www.regulations.gov* and enter USCIS–2005–0033 in the search box. The comments submitted to USCIS via this method are visible to the Office of Management and Budget and comply with the requirements of 5 CFR 1320.12(c). All submissions will be posted, without change, to the Federal eRulemaking Portal at *https://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *https://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

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

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

Overview of This Information Collection

(1) *Type of Information Collection Request:* Extension, Without Change, of a Currently Approved Collection.

(2) *Title of the Form/Collection:* USCIS Case Status Online.

(3) *Agency form number, if any, and the applicable component of the DHS*

sponsoring the collection: No Agency Form Number; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. This system allows individuals or their representatives to request case status of their pending application through USCIS' website.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection USCIS Case Status Online is 7,020,000 and the estimated hour burden per response is 0.075 hours (4.5 minutes).

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 526,500 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $0, any costs are captured in the original form filed by the respondent.

Dated: December 22, 2021.

Samantha L. Deshommes,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2021–28243 Filed 12–28–21; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0033]

Agency Information Collection Activities; Extension, Without Change, of a Currently Approved Collection: Report of Medical Examination and Vaccination Record

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 30–Day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The purpose of this notice is to allow an additional 30 days for public comments.

DATES: Comments are encouraged and will be accepted until January 28, 2022.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, must be submitted via the Federal eRulemaking Portal website at *http://www.regulations.gov* under e-Docket ID number USCIS–2006–0074. All submissions received must include the OMB Control Number 1615–0033 in the body of the letter, the agency name and Docket ID USCIS–2006–0074.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, Telephone number (240) 721–3000 (This is not a toll-free number; comments are not accepted via telephone message.). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *http://www.uscis.gov*, or call the USCIS Contact Center at (800) 375–5283; TTY (800) 767–1833.

SUPPLEMENTARY INFORMATION:

Comments

The information collection notice was previously published in the **Federal Register** on October 15, 2021, at 86 FR 57438, allowing for a 60-day public comment period. USCIS received one comment in connection with the 60-day notice.

You may access the information collection instrument with instructions, or additional information by visiting the Federal eRulemaking Portal site at: *http://www.regulations.gov* and enter USCIS–2006–0074 in the search box. The comments submitted to USCIS via this method are visible to the Office of Management and Budget and comply with the requirements of 5 CFR 1320.12(c). All submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov*, and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov*.

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used

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

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

Overview of This Information Collection

(1) *Type of Information Collection:* Extension, Without Change, of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Report of Medical Examination and Vaccination Record.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–693; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit. The information on the Report of Medical Examination and Vaccination Record, Form I–693, will be used by USCIS when considering the eligibility for adjustment of status under 8 CFR 209.1(c), 209.2(d), 210.2(d), 245.5 and 245a.3(d)(4); and for V nonimmigrant status under 8 CFR 214.15(f). The information on the Report of Medical Examination and Vaccination Record, Form I–693, will be used by EOIR in considering the eligibility for immigration benefits in removal proceedings. The information on the Report of Medical Examination and Vaccination Record, Form I–693, may also be used by CBP in determining admissibility at a port of entry.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–693 is 667,000 and the

estimated hour burden per response is 3 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 2,001,000 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $329,331,250.

Dated: December 23, 2021.

Samantha L. Deshommes,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2021–28321 Filed 12–28–21; 8:45 am]

BILLING CODE 9111–97–P938

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0067]

Agency Information Collection Activities; Extension, Without Change, of a Currently Approved Collection: Application for Asylum and for Withholding of Removal

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 60-day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) invites the general public and other Federal agencies to comment upon this proposed extension of a currently approved collection of information. In accordance with the Paperwork Reduction Act (PRA) of 1995, the information collection notice is published in the **Federal Register** to obtain comments regarding the nature of the information collection, the categories of respondents, the estimated burden (*i.e.* the time, effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments.

DATES: Comments are encouraged and will be accepted for 60 days until February 28, 2022.

ADDRESSES: All submissions received must include the OMB Control Number 1615–0067 in the body of the letter, the agency name and Docket ID USCIS–2007–0034. Submit comments via the Federal eRulemaking Portal Web site at *https://www.regulations.gov* under e-Docket ID number USCIS–2007–0034.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, telephone number (240) 721–3000 (This is not a toll-free number. Comments are not accepted via telephone message). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS Web site at *https://www.uscis.gov,* or call the USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

SUPPLEMENTARY INFORMATION:

Comments

You may access the information collection instrument with instructions or additional information by visiting the Federal eRulemaking Portal site at: *https://www.regulations.gov* and entering USCIS–2007–0034 in the search box. All submissions will be posted, without change, to the Federal eRulemaking Portal at *https://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *https://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

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

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

Overview of This Information Collection

(1) *Type of Information Collection:* Extension, Without Change, of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Asylum and for Withholding of Removal.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* Form I–589; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. Form I–589 is necessary to determine whether an alien applying for asylum and/or withholding of removal in the United States is classified as refugee and is eligible to remain in the United States.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–589 is approximately 85,500 and the estimated hour burden per response is 12 hours per response; the estimated total number of respondents for the information collection I–589 (online filing) is approximately 28,500 and the estimated hour burden per response is 11 hours per response, and the estimated number of respondents providing biometrics is 110,000 and the estimated hour burden per response is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 1,468,200 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $46,968,000.

Dated: December 23, 2021.

Samantha L. Deshommes,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2021–28322 Filed 12–28–21; 8:45 am]

BILLING CODE 9111–97–P1033

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCON05000.L16100000.DU0000; COC–80216]

Notice of Intent To Amend the White River Resource Management Plan and Prepare an Environmental Assessment; Notice of Realty Action: Proposed Sale of Public Lands in Rio Blanco County, CO

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of intent and notice of realty action.

SUMMARY: The Bureau of Land Management (BLM) is proposing to amend the 1997 White River Resource Management Plan (RMP) to allow for the disposal of 3.73 acres of public land to the Colorado Northwestern Community College (CNCC) at the appraised fair market value of $25,000.

DATES: Interested parties may submit written comments regarding the RMP amendment planning criteria and proposed land sale during the 45-day scoping and comment period initiated by publication of this notice in the **Federal Register** and ending on February 14, 2022. All timely comments will be considered during analysis of the RMP amendment and land sale proposal.

ADDRESSES: Send written comments to Monte Senor, Acting Field Manager, BLM, White River Field Office, 220 East Market Street, Meeker, CO 81641 or by email to *blm_co_wrfo_sale@blm.gov.*

Project information, documents, and associated maps will be available for review during associated public comment and review periods during business hours Monday through Friday at the White River Field Office, except during federally recognized holidays. Project information will also be available on the BLM's e-Planning website: *https://go.usa.gov/x79BM.*

FOR FURTHER INFORMATION CONTACT: Heather Sauls, Planning and Environmental Coordinator, BLM White River Field Office, telephone: 970–878–3855, or by email at *hsauls@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1 (800) 877–8339 during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The direct sale would be subject to applicable provisions of Section 203 of the Federal Land Policy and Management Act of 1976, as amended (FLPMA), and BLM land-sale regulations. Publication of this notice in the **Federal Register** also segregates the subject lands from all appropriation under the public land laws, including the general mining laws, and from the mineral leasing and geothermal leasing laws, except the sales provisions of FLPMA. This notice initiates the public scoping process with a 45-day comment period for the RMP amendment and associated Environmental Assessment (EA) effort. The BLM invites the public to submit comments concerning the scope of analysis and identification of relevant information involving the proposed plan amendment identified in the planning criteria and disposal action.

The purpose and need of the proposed action is to resolve an inadvertent, unauthorized use on public lands for continued operations of an existing shooting range that has been in use for over 20 years. The CNCC shooting range was previously authorized in 1997, but the lease expired in 2006 and was never renewed. This action would allow continued use of the shooting range for training law enforcement officers while alleviating the BLM of any responsibility for oversight, management, and possible future remedial actions of any contamination at the site due to the use of lead ammunition. If this parcel is sold to CNCC, the BLM anticipates authorizing right-of-way grants for an existing access road and power line that serve the shooting range.

The CNCC shooting range is an outdoor range that is presently used by nearly every law enforcement agency in the area for training purposes. These agencies include the Rangely Police Department, Rio Blanco County Sheriff's Office, Colorado Parks and Wildlife, and the National Park Service's Dinosaur National Monument, all of which send their respective armed officers to the range to conduct firearms training. Additionally, CNCC's National Park Ranger Academy conducts 6 weeks of firearms training annually at the range as part of the Federal Law Enforcement Training Center's required curriculum for the basic training of seasonal law enforcement officers.

The RMP identifies parcels suitable for disposal, but the subject lands are not currently listed as available for disposal. The BLM will analyze the suitability for disposal of the 3.73 acres per the criteria listed in FLPMA Section 203(a). The proposed RMP amendment would allow for the lands to be sold if they are found suitable for disposal. The planning criteria identifying the issues and their analytical frameworks the BLM proposes to use to guide the effects analysis of the RMP amendment is provided for review on the BLM's ePlanning website: *https://go.usa.gov/x79BM.*

The BLM is considering a direct sale of the following described lands:

Sixth Principal Meridian, Colorado, T. 1 N., R. 102 W., sec. 12, lot 2.

The area aggregates 3.73 acres.

If issued, the patent will include the following terms, covenants, conditions, and reservations:

1. A reservation to the United States for all minerals;
2. A reservation to the United States for ditches and canals constructed by authority of the United States under the Act of August 30, 1890 (43 U.S.C. 945);
3. Valid existing rights of record; and
4. Additional terms and conditions that the authorized officer deems appropriate.

Segregation: The segregation will terminate automatically upon issuance of a patent or on December 29, 2023, whichever occurs first. The BLM is no longer accepting land-use applications affecting the subject public lands, except applications to amend previously filed right-of-way applications or existing authorizations to increase grant terms in accordance with 43 CFR 2807.15 and 43 CFR 2886.15.

Notification to Grazing Use Authorization Holders: This notice also initiates a 2-year notification to grazing-use authorization holders that the BLM is considering disposing of the subject lands and that such authorizations may be cancelled in accordance with 43 CFR 4110.4–2(b).

Additional opportunities to participate in this process: Interested parties will be notified when the Draft RMP amendment, EA, and unsigned Finding of No Significant Impact (FONSI) are ready for review and will be provided another 30-day comment period. Upon review of comments to the Draft RMP amendment, EA, and unsigned FONSI, a Proposed RMP amendment, EA, and signed FONSI will be completed. Interested parties will be notified again when the Proposed RMP amendment, EA, and signed FONSI are ready for review, which will initiate three separate external engagement opportunities. First, interested parties will be provided a 30-day protest period subject to 43 CFR 1610.5–2 on the proposed RMP amendment to the BLM Director. The BLM Director will review all protests and must render a decision on the protests to the land use planning decisions, which shall be the final decision for the Department of the Interior (43 CFR 1610.5–2(b)). Second,

the notification will begin a separate, concurrent 60-day Governor's consistency review of the proposed RMP amendment (43 CFR 1610.3–2(e)). The BLM Colorado State Director will review any inconsistencies with State plans, policies, or programs raised by the Governor and accept or reject recommendations proposed to resolve the inconsistencies. Any rejection of the recommendations will initiate a further 30-day appeal period for the Governor on the BLM Colorado State Director's rejection of the recommendations. Third, the notification of the Proposed RMP amendment, EA, and signed FONSI will also begin a separate, concurrent 30-day protest period subject to MS2711.4(d) on the land-sale decision. The BLM Colorado State Director will review all protests and may sustain, vacate, or modify the RMP amendment and land sale, in whole or in part. In the absence of any protests, the BLM will develop the approved RMP amendment and Decision Record which will document the final determination of the Department of the Interior for the land sale.

In addition to publication in the **Federal Register**, the BLM will publish this notice in the Rio Blanco Herald Times newspaper once a week for 3 consecutive weeks. Any other subsequent notices related to the RMP amendment and land sale may also be published in the Rio Blanco Herald newspaper.

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

(*Authority:* 43 CFR 2711.1–2, 43 CFR 1610.2)

Jamie E. Connell,

Colorado State Director.

[FR Doc. 2021–28257 Filed 12–28–21; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–DTS#33187; PPWOCRADI0, PCU00RP14.R50000]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The National Park Service is soliciting electronic comments on the significance of properties nominated before December 18, 2021, for listing or related actions in the National Register of Historic Places.

DATES: Comments should be submitted electronically by January 13, 2022.

ADDRESSES: Comments are encouraged to be submitted electronically to *National_Register_Submissions@nps.gov* with the subject line ''Public Comment on <property or proposed district name, (County) State>.'' If you have no access to email you may send them via U.S. Postal Service and all other carriers to the National Register of Historic Places, National Park Service, 1849 C Street NW, MS 7228, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Sherry A. Frear, Chief, National Register of Historic Places/National Historic Landmarks Program, 1849 C Street NW, MS 7228, Washington, DC 20240, *sherry_frear@nps.gov,* 202–913–3763.

SUPPLEMENTARY INFORMATION:

The properties listed in this notice are being considered for listing or related actions in the National Register of Historic Places. Nominations for their consideration were received by the National Park Service before December 18, 2021. Pursuant to Section 60.13 of 36 CFR part 60, comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation.

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

Nominations submitted by State or Tribal Historic Preservation Officers:

CALIFORNIA

Sacramento County

Murer House and Gardens, 1125 Joe Murer Ct., Folsom, SG100007367

CONNECTICUT

Hartford County

Hartford Special Machinery Company Complex, 287 and 296 Homestead Ave., Hartford, SG100007374

Litchfield County

Harry O. Erikson Pavilion Hall, 17 East Shore Rd., Washington, SG100007375

FLORIDA

Lake County

Okahumpka Rosenwald School (Florida's Historic Black Public Schools MPS), 27908 Virgil Hawkins Cir., Okahumpka, MP100007365

Polk County

Perry House (Sarasota School of Architecture MPS), 2208 Woodbine Ave., Lakeland, MP100007366

GEORGIA

Chatham County

Savannah Water Works Pump House, 1204 West Gwinnett St., Savannah, SG100007368

KENTUCKY

Campbell County

Dayton City Hall, 635 Dayton Ave., Dayton, SG100007373

MINNESOTA

Hennepin County

Hopkins Commercial Historic District, Mainstreet between 8th and 11th Aves. North, Hopkins, SG100007369

NEW YORK

Chautauqua County

Lily Dale Assembly Historic District, South St., Cottage Row, Lake Front Dr., East, 4th, 3rd, 2nd, 1st, North, Library, Buffalo, Marion, and Erie Sts., Cleveland Ave., Ridgeway Cir., The Boulevard, Pomfet, SG100007380

Lily Dale Assembly Historic District, South St., Cottage Row, Lake Front Dr., East, 4th, 3rd, 2nd, 1st, North, Library, Buffalo, Marion, and Erie Sts., Cleveland Ave., Ridgeway Cir., The Boulevard, Cassadaga, SG100007380

Monroe County

Ellwanger and Barry Building, 39–41 State St., Rochester, SG100007376

Nassau County

Jackson, John II, House, 1419 Wantagh Ave., Wantagh, SG100007370

Queens County

Ridgewood Fresh Pond Road-Myrtle Avenue Historic District, Generally Fresh Pond Rd. and Myrtle Ave., Queens, SG100007371

Rockland County

West, J. Garner, House, 168 Filors Ln., Stony Point, SG100007379

Schenectady County

Schenectady Public Market and Scale House, Bounded by Clinton St., Van Guysling Ave., Broadway, and Hamilton St., Schenectady, SG100007377

Schenectady Savings Bank, 500 State St., Schenectady, SG100007378

Suffolk County

de Kooning, Elaine, House and Studio, 55 Alewive Brook Rd., East Hampton, SG100007372

OREGON

Deschutes County

Swanson, Norman and Frances, House (Residential Resources of Redmond, Oregon MPS), 327 NW Canyon Dr., Redmond, MP100007384

TEXAS

El Paso County

Patterson Apartments, 1217 North Mesa St., El Paso, SG100007381

Additional documentation has been received for the following resource:

OREGON

Multnomah County

Zimmerman, Jacob, House, 17111 NE Sandy Blvd., Gresham, AD86001226

Authority: Section 60.13 of 36 CFR part 60.

Dated: December 21, 2021.

Sherry A. Frear,

Chief, National Register of Historic Places/National Historic Landmarks Program.

[FR Doc. 2021–28274 Filed 12–28–21; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2007–0042]

TUV Rheinland of North America, Inc.: Grant of Expansion of Recognition

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice.

SUMMARY: In this notice, OSHA announces the final decision to expand the scope of recognition for TUV Rheinland of North America, Inc., as a Nationally Recognized Testing Laboratory (NRTL).

DATES: The expansion of the scope of recognition becomes effective on December 29, 2021.

FOR FURTHER INFORMATION CONTACT: Information regarding this notice is available from the following sources:

Press inquiries: Contact Mr. Frank Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor; telephone: (202) 693–1999; email: *meilinger.francis2@dol.gov.*

General and technical information: Contact Mr. Kevin Robinson, Director, Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, U.S. Department of Labor; telephone: (202) 693–2110; email: *robinson.kevin@dol.gov.* OSHA's web page includes information about the NRTL Program (see *http://www.osha.gov/dts/otpca/nrtl/index.html*).

SUPPLEMENTARY INFORMATION:

I. Notice of Final Decision

OSHA hereby gives notice of the expansion of the scope of recognition of TUV Rheinland of North America, Inc. (TUVRNA), as a NRTL. TUVRNA's expansion covers the addition of one test standard to the NRTL scope of recognition.

OSHA recognition of a NRTL signifies that the organization meets the requirements specified in 29 CFR 1910.7. Recognition is an acknowledgment that the organization can perform independent safety testing and certification of the specific products covered within the scope of recognition. Each NRTL's scope of recognition includes (1) the type of products the NRTL may test, with each type specified by the applicable test standard and (2) the recognized site(s) that has/have the technical capability to perform the product-testing and product-certification activities for test standards within the NRTL's scope. Recognition is not a delegation or grant of government authority; however, recognition enables employers to use products approved by the NRTL to meet OSHA standards that require product testing and certification.

The agency processes applications by NRTLs or applicant organizations for initial recognition, as well as for expansion or renewal of recognition, following requirements in Appendix A to 29 CFR 1910.7. This appendix requires that the agency publish two notices in the **Federal Register** in processing an application. In the first notice, OSHA announces the application and provides the preliminary finding. In the second notice, the agency provides the final decision on the application. These notices set forth the NRTL's scope of recognition or modifications of that scope. OSHA maintains an informational web page for each NRTL, including TUVRNA, which details that NRTL's scope of recognition. These pages are available from the OSHA website at *http://www.osha.gov/dts/otpca/nrtl/index.html.*

TUVRNA submitted an application, dated May 14, 2019 (OSHA–2007–0042–0055), to expand recognition to include the addition of one test standard. OSHA staff performed a detailed analysis of the application packet and reviewed other pertinent information. OSHA did not perform any on-site reviews in relation to this application.

OSHA published the preliminary notice announcing TUVRNA's expansion applications in the **Federal Register** on November 1, 2021 (86 FR 60296). The agency requested comments by November 16, 2021, but it received no comments in response to this notice. OSHA now is proceeding with this final notice to grant expansion of TUVRNA's scope of recognition.

To review copies of all public documents pertaining to TUVRNA's application, go to *www.regulations.gov* or contact the Docket Office, Occupational Safety and Health Administration, U.S. Department of Labor at (202) 693–2350. Docket No. OSHA–2007–0042 contains all materials in the record concerning TUVRNA's recognition. Please note: Due to the COVID–19 pandemic, the Docket Office is closed to the public at this time but can be contacted at (202) 693–2350, TTY (877) 889–5627.

II. Final Decision and Order

OSHA staff examined TUVRNA's expansion application, their capability to meet the requirements of the test standard, and other pertinent information. Based on its review of this evidence, OSHA finds that TUVRNA meets the requirements of 29 CFR 1910.7 for expansion of its recognition, subject to the limitations and conditions listed below. OSHA, therefore, is proceeding with this final notice to grant TUVRNA's scope of recognition. OSHA limits the expansion of TUVRNA's recognition to testing and certification of products for demonstration of conformance to the test standard shown below in Table 1.

TABLE 1—APPROPRIATE TEST STANDARD FOR INCLUSION IN TUVRNA'S NRTL SCOPE OF RECOGNITION

Test standard	Test standard title
UL 60335–2–40	Household and Similar Electrical Appliances—Safety—Part 2–40: Particular Requirements for Electrical Heat Pumps, Air-Conditioners and Dehumidifiers.

OSHA's recognition of any NRTL for a particular test standard is limited to equipment or materials for which OSHA standards require third-party testing and certification before using them in the workplace. Consequently, if a test standard also covers any products for which OSHA does not require such testing and certification, a NRTL's scope of recognition does not include these products.

A. Conditions

Recognition is contingent on continued compliance with 29 CFR 1910.7, including but not limited to, abiding by the following conditions of recognition:

1. TUVRNA must inform OSHA as soon as possible, in writing, of any change of ownership, facilities, or key personnel, and of any major change in its operations as a NRTL, and provide details of the change(s);

2. TUVRNA must meet all the terms of its recognition and comply with all OSHA policies pertaining to this recognition; and

3. TUVRNA must continue to meet the requirements for recognition, including all previously published conditions on TUVRNA's scope of recognition, in all areas for which it has recognition.

OSHA hereby expands the scope of recognition of TUVRNA, subject to the limitations and conditions specified above.

III. Authority and Signature

Douglas L. Parker, Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution Avenue NW, Washington, DC 20210, authorized the preparation of this notice. Accordingly, the agency is issuing this notice pursuant to 29 U.S.C. 657(g)(2), Secretary of Labor's Order No. 8–2020 (85 FR 58393, September 18, 2020) and 29 CFR 1910.7.

Signed at Washington, DC, on December 15, 2021.

Douglas L. Parker,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2021–28270 Filed 12–28–21; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2021–0013]

Pilot Study and Prospective Analysis of Draft Revised Form 33, Safety and Health Program Assessment Worksheet; New—Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning the proposal to extend OMB approval of the information collection requirements contained in the regulations addressing On-Site Consultation Agreements.

DATES: Comments must be submitted (postmarked, sent, or received) by February 28, 2022.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Instructions: All submissions must include the agency name and the OSHA docket number (OSHA–2021–0013) for the Information Collection Request (ICR). OSHA will place all comments, including personal information, in the public docket, which may be available online. Therefore, OSHA cautions interested parties about submitting personal information such as social security numbers and birthdates. For further information on submitting comments, see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION.**

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov.* All documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the website. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Contact the OSHA Docket Office at (202) 693–2350, (TTY (877) 889–5627) for assistance in locating docket submissions.

FOR FURTHER INFORMATION CONTACT: Patrick Showalter, Director, Office of Small Business Assistance, Directorate of Cooperative and State Programs, OSHA, U.S. Department of Labor, telephone (202) 693–2220.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of the continuing effort to reduce paperwork and respondent (*i.e.,* employer) burden, conducts a preclearance process to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires OSHA to obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of efforts in obtaining information (29 U.S.C. 657).

Section 7(c)(1) of the OSH Act authorizes the Secretary of Labor (Secretary) to, ''with the consent of any State or political subdivision thereof, accept and use the services, facilities, and personnel of any agency of such State or subdivision with reimbursement.'' Section 21(c) of the OSH Act authorizes the Secretary to ''consult with and advise employers and employees . . . as to effective means of preventing occupational illnesses and injuries.''

Additionally, Section 21(d) of the OSH Act instructs the Secretary to ''establish and support cooperative agreements with the States under which employers subject to the Act may consult with State personnel with respect to the application of occupational safety and health requirements under the Act or under State plans approved under section 18 of the Act.'' This gives the Secretary authority to enter into agreements with the States to provide On-Site Consultation services and establish

rules under which employers may qualify for an inspection exemption. To satisfy the intent of these and other sections of the OSH Act, OSHA codified the terms that govern cooperative agreements between OSHA and State governments whereby State agencies provide On-Site Consultation services to private employers to assist them in complying with the requirements of the OSH Act. The terms were codified as the Consultation Agreement regulations (29 CFR part 1908).

The Occupational Safety and Health Administration (OSHA) is requesting approval from the Office of Management and Budget (OMB), pursuant to the Paperwork Reduction Act (PRA), to conduct validity and reliability analyses of a safety and health program (SHP) assessment worksheet, the Draft Revised Form 33 (DRF33), that will replace the current SHP Assessment Worksheet, OSHA Form 33, used by the OSHA On-Site Consultation Program (OMB #1218–0110; Expiration Date: January 31, 2022). The studies that will be conducted on the DRF33 will enable OSHA to ensure that a valid, reliable, and efficient tool is provided to On-Site Consultation programs in the fifty (50) states, the District of Columbia, and several United States territories to replace the current OSHA Form 33, thereby, enhancing the quality of consultative services.

The studies for which OSHA is requesting approval will comprise a pre-test (20 consultation visits; to assess Pilot Study procedures and information technology platform, and correct any issues before launching the Pilot Study), Pilot Study (300 consultation visits; to assess the validity and reliability of the DRF33), a follow-up study (30 consultation visits; to assess any updates to the DRF33 resulting from Pilot Study findings), and a Prospective Analysis (conducted 12 months after the Pilot Study to assess any impact of the DRF33 at workplaces that received consultation visits during the Pilot Study).

After completing the Pilot Study OSHA will request OMB approval before implementing the DRF33 for use by state On-Site Consultation programs nationwide (to replace the current Form 33). Similarly, OSHA will seek OMB approval if any additional updates are made to the approved worksheet, following the Prospective Analysis.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply—for example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

This is s a new request for clearance. The agency is requesting a total of 4,975 burden hours.

Type of Review: NEW.

Title: Pilot Study and Prospective Analysis of the Draft Revised Form 33, Safety and Health Program Assessment Worksheet.

OMB Control Number: 1218–0NEW.

Affected Public: Business or other for-profits.

Number of Respondents: 350.

Frequency: Initial, annual, quarterly, periodic.

Average Time per Response: Varies.

Estimated Number of Responses: 2,069.

Estimated Total Burden Hours: 4.975.

Estimated Cost (Operation and Maintenance): $0.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) Electronically at *https://www.regulations.gov,* which is the Federal eRulemaking Portal; (2) by facsimile (fax); or (3) by hard copy. Please note: While OSHA's Docket Office is continuing to accept and process submissions by hand, express mail, messenger, and courier service. All comments, attachments, and other material must identify the agency name and the OSHA docket number for the ICR (Docket No. OSHA–2021–0113) for the ICR. You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify your electronic comments by your name, date, and the docket number so that the agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments.

Comments and submissions are posted without change at *https://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and dates of birth. Although all submissions are listed in the *https://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publicly available to read or download through this website.

All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *https://www.regulations.gov* website to submit comments and access the docket is available at the website's ''User Tips'' link. Contact the OSHA Docket Office for information about materials not available through the website, and for assistance in using the internet to locate docket submissions.

V. Authority and Signature

Doug Parker, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 1–2012 (77 FR 3912).

Doug Parker,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2021–28309 Filed 12–28–21; 8:45 am]

BILLING CODE 4510–26–P1006

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2010–0055]

Recordkeeping and Reporting Occupational Injuries and Illnesses; Revision of the Office and Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

SUMMARY: The Occupational Safety and Health Administration (OSHA) is soliciting comments concerning the proposed revision of the current information collection requirements contained in the regulation regarding Recordkeeping and Reporting Occupational Injuries and Illnesses.

DATES: Comments must be submitted (postmarked, sent or received) by February 28, 2022.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at *http://www.regulations.gov*, which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov*. Documents in the docket are listed in the *http://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the website. All submissions, including copyrighted material, are available for inspection through the OSHA Docket Office. Contact the OSHA Docket Office at (202) 693–2350, (TTY (877) 889–5627) for assistance in locating docket submissions.

Instructions: All submissions must include the agency name and the OSHA docket number for this **Federal Register** notice (OSHA–2010–0055). OSHA will place comments and requests to speak, including personal information, in the public docket, which may be available online. Therefore, OSHA cautions interested parties about submitting personal information such as Social Security numbers and birthdates. For further information on submitting comments, see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Seleda Perryman or Theda Kenney, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Occupational Safety and Health Act (OSH Act) and 29 CFR part 1904 prescribe that certain employers maintain records of job-related injuries and illnesses. The injury and illness records are intended to have multiple purposes. One purpose is to provide data needed by OSHA to carry out enforcement and intervention activities to provide workers a safe and healthy work environment. The data are also needed by the Bureau of Labor Statistics to report on the number and rate of occupational injuries and illnesses in the country. The data also provides information to employers and workers of the kinds of injuries and illnesses occurring in the workplace and their related hazards. Increased employer awareness should result in the identification and voluntary correction of hazardous workplace conditions. Likewise, workers who are provided information on injuries and illnesses will be more likely to follow safe work practices and report workplace hazards. This would generally raise the overall level of safety and health in the workplace. This notice initiates the process for OSHA to request an extension of the current OMB approval. This notice also solicits public comments on OSHA's existing paperwork burden estimates from those interested parties and seeks public responses to several questions related to the development of OSHA's estimates. Interested parties are requested to review OSHA's estimates, which are based upon the most current data available, and to comment on their accuracy or appropriateness in today's workplace situation.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for proper performance of the agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply. For example, by using automated or other technological information collection and transmission techniques.

III. Proposed Action

OSHA is requesting that OMB revise the approval of the information collection requirements contained in 29 CFR part 1904, Recordkeeping and Reporting Occupational Injuries and Illnesses. The agency is requesting to reduce the current burden hour estimate associated with this regulation from 2,140,861 hours to 2,048,626 for a total reduction of 92,235 hours. The agency will summarize the comments submitted in response to this notice and will include this summary in the request to OMB.

Type of Review: Revision of a currently approved collection.

Title: Recordkeeping and Reporting Occupational Injuries and Illnesses (29 CFR part 1904).

OMB Control Number: 1218–0176.

Affected Public: Business or other for-profits farms; not-for-profit institutions; State and local government.

Number of Respondents: 5,113,141.

Frequency: On occasion.

Average Time per Response: Various.

Estimated Total Burden Hours: 2,048,626.

Estimated Cost (Operation and Maintenance): $0.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) Electronically at *http://www.regulations.gov*, which is the Federal eRulemaking Portal; (2) by facsimile (fax); or (3) by hard copy. All comments, attachments, and other materials must identify the agency name and the OSHA docket number for the ICR (Docket No. OSHA–2010–0055). You may supplement electronic submissions by uploading document files electronically. *Please note:* While OSHA's Docket Office is continuing to accept and process submissions by regular mail, due to the COVID–19 pandemic, the Docket Office is closed to the public and not able to receive submissions to the docket by hand, express mail, messenger, and courier service. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify your electronic comments by your name, date, and the docket number so the agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments.

Comments and submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and date of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publicly available to read or download from this website.

All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* website to submit comments and access the docket is available at the website's ''User Tips'' link. Contact the OSHA Docket Office for information about materials not available from the website, and for assistance in using the internet to locate docket submissions.

V. Authority and Signature

Douglas L. Parker, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 1–2012 (77 FR 3912).

Signed at Washington, DC, on December 15, 2021.

Douglas L. Parker,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2021–28271 Filed 12–28–21; 8:45 am]

BILLING CODE 4510–26–P

NUCLEAR REGULATORY COMMISSION

[NRC–2021–0220]

Revision of Fees for the Criminal History Program: Fee Recovery for Fiscal Year 2022

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Notification to licensees of criminal history check fee increase.

SUMMARY: The U. S. Nuclear Regulatory Commission (NRC) will increase the current fee of 10 dollars assessed to applicants and licensees for criminal history record checks to 35 dollars. This fee increase is necessary to recover the full cost for the administration of the Criminal History Program (CHP). Information regarding this change can be found on the NRC's CHP public website at *https://www.nrc.gov/security/chp.html* and in the CHP users guide at *https://www.nrc.gov/site-help/e-submittals/criminal-history-user-guide.pdf.*

DATES: The fee increase will begin on March 1, 2022.

ADDRESSES: Please refer to Docket ID NRC–2021–0220 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:

- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *PDR.Resource@nrc.gov.*
- *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.

FOR FURTHER INFORMATION CONTACT: Doreen Turner, Office of Nuclear Security and Incident Response, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–7553, email: *Doreen.Turner@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In July 2017, the NRC lowered the fee assessed to applicants and licensees for criminal history record checks from 26 dollars to 10 dollars to draw down on a surplus balance of fee receipts. The NRC's CHP costs have historically been fully covered from fees collected. Over the past several years, the surplus balance of CHP funding has been exhausted, and the program is now operating at a deficit.

Pursuant to requirements in the Chief Financial Officers Act of 1990 (31 U.S.C.), the NRC conducts biennial reviews of the charges assessed to applicants and licensees for CHP background checks to assess the suitability of fees to cover both the cost charged by the Federal Bureau of Investigation (FBI) and the costs of NRC to administer the program. The biennial review completed in Fiscal Year (FY) 2019, concluded that the current fee of 10 dollars being charged to applicants and licensees was not sufficient to recover the full cost of administering the program and the NRC should increase its fee. During FY 2020, the fees charged to applicants and licensees for CHP records checks were not raised due to the COVID–19 public health emergency and a decision by the NRC to defer the fee increase temporarily.

II. Discussion

The last biennial review completed by NRC at the end of FY 2021 reaffirmed that the current fee of 10 dollars being charged to applicants and licensees was not sufficient to recover the full cost of administering the program, and the NRC should increase its fee to 35 dollars. This fee is the sum of the user fee charged by the FBI ($11.25 effective January 1, 2019) plus NRC's direct and indirect costs incurred in processing fingerprints.

As a reminder, payment is due upon fingerprint card submission, and the NRC's preferred method of payment is through *Pay.gov* at *https://www.pay.gov* which includes payment by debit or credit card or electronic funds transfer (e-check). Although electronic is preferred, the NRC also accepts cashier checks or money orders made payable to the U.S. Nuclear Regulatory Commission. Fingerprint cards along with proof of payment should be sent to:

U.S. Nuclear Regulatory Commission: Director, Division of Physical and Cyber Security Policy, Attn: Criminal History Program/Mail Stop—T–07D04M, 11545 Rockville Pike, Rockville, MD 20852–2738

Contact: Doreen Turner, Criminal History Program Manager, Ph. 301–415–7553, *Doreen.Turner@nrc.gov*

Dated: December 22, 2021.

For the Nuclear Regulatory Commission.

Sabrina D. Atack,

Acting Director, Division of Physical and Cyber Security Policy, Office of Nuclear Security and Incident Response.

[FR Doc. 2021–28262 Filed 12–28–21; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2021–0159]

Environmental Assessment and Finding of No Significant Impact of Morris Operation Decommissioning Funding Plans

AGENCY: Nuclear Regulatory Commission.

ACTION: Environmental assessment and Finding of No Significant Impact; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is publishing this notice regarding the issuance of a final Environmental Assessment (EA) and a Finding of No Significant Impact (FONSI) for its review and approval of the initial and updated decommissioning funding plans submitted by GE-Hitachi Nuclear Energy Americas, LLC, for the Morris Operation Independent Spent Fuel Storage Installation.

DATES: The final EA and FONSI referenced in this document are available on December 29, 2021.

ADDRESSES: Please refer to Docket ID NRC–2021–0159 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–2021–0159. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

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

• *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.

FOR FURTHER INFORMATION CONTACT: Kristina L. Banovac, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–7116, email: *Kristina.Banovac@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is considering the approval of the initial and updated decommissioning funding plans (DFPs) submitted by GE-Hitachi Nuclear Energy Americas, LLC, (GEH) for the Morris Operation Independent Spent Fuel Storage Installation (ISFSI). The NRC staff has prepared a final Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) determination for the initial and updated DFPs in accordance with the NRC regulations in part 51 of title 10 of the Code of Federal Regulations (10 CFR), ''Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions,'' which implements the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321, *et seq.*).

The NRC requires its licensees to plan for the eventual decommissioning of their licensed facilities prior to license termination. On June 17, 2011, the NRC published a final rule in the **Federal Register** amending its decommissioning planning regulations (76 FR 35512). The final rule amended the NRC regulation, 10 CFR 72.30, which concerns financial assurance and decommissioning for ISFSIs. This regulation requires each holder of, or applicant for, a license under 10 CFR part 72 to submit a DFP for the NRC's review and approval. The DFP is to demonstrate the licensee's financial assurance, *i.e.,* that funds will be available to decommission the ISFSI. The NRC staff will later publish its financial analyses of the DFP submittals which will be available for public inspection in ADAMS.

II. Discussion

The table in this notice includes the ADAMS accession numbers for the final EA and FONSI determination for the Morris Operation ISFSI. The table also includes the ADAMS accession numbers for other relevant documents, including the initial and updated DFP submittals. For further details with respect to this action, see the NRC staff's final EA and FONSI determinations which are available for public inspection in ADAMS and at *https://www.regulations.gov* under Docket ID NRC–2021–0159. For additional direction on accessing information related to this document, see the **ADDRESSES** section of this document.

FINDING OF NO SIGNIFICANT IMPACT

Facility	Morris operation ISFSI
Docket No	72–01.
Licensee	GEH.
Proposed Action	The NRC's review and approval of GEH's initial and updated DFPs submitted in accordance with 10 CFR 72.30(b) and (c).
	Environmental Impact of Proposed Action The NRC staff has determined that the proposed action, the review and approval of GEH's initial and updated DFPs, submitted in accordance with 10 CFR 72.30(b) and (c), will not authorize changes to licensed operations or maintenance activities, or result in changes in the types, characteristics, or quantities of radiological or non-radiological effluents released into the environment from the ISFSI, or result in the creation of solid waste. Moreover, the approval of the initial and updated DFPs will not authorize any construction activity, facility modification, or other land-disturbing activity. The NRC staff has concluded that the proposed action is a procedural and administrative action that will not have a significant impact on the environment.
Finding of No Significant Impact	The proposed action does not require changes to the ISFSI's licensed routine operations, maintenance activities, or monitoring programs, nor does it require new construction or land-disturbing activities. The scope of the proposed action concerns only the NRC's review and approval of GEH's initial and updated DFPs. The scope of the proposed action does not include, and will not result in, the review and approval of decontamination or decommissioning activities or license termination for the ISFSI. Therefore, the NRC staff determined that approval of the initial and updated DFPs for the Morris Operation ISFSI will not significantly affect the quality of the human environment, and accordingly, the staff has concluded that a FONSI is appropriate. The NRC staff further finds that preparation of an environmental impact statement is not required.
Available Documents	U.S. Nuclear Regulatory Commission. Environmental Assessment re: Final Rule: Decommissioning Planning (10 CFR parts 20, 30, 40, 50, 70, and 72; RIN 3150–AI55). February 2009. ADAMS Accession No. ML090500648.
	U.S. Nuclear Regulatory Commission. ESA Section 7 No Effect Determination for ISFSI DFP Reviews (Note to File), dated May 15, 2017. ADAMS Accession No. ML17135A062.
	U.S. Nuclear Regulatory Commission. Review of the Draft Environmental Assessment and Finding of No Significant Impact for the GE Morris Independent Spent Fuel Storage Installation Decommissioning Funding Plan, dated August 17, 2017. ADAMS Accession No. ML17226A160.

FINDING OF NO SIGNIFICANT IMPACT—Continued

Facility	Morris operation ISFSI
	U.S. Nuclear Regulatory Commission. Request for Additional Information Regarding GE-Hitachi's Decommissioning Funding Plan Update for Morris Independent Spent Fuel Storage Installation, dated February 28, 2018. ADAMS Package Accession No. ML18060A330. U.S. Nuclear Regulatory Commission. Conversation Record of April 6, 2021, call with GEH, dated April 12, 2021. ADAMS Accession No. ML21103A429. U.S. Nuclear Regulatory Commission. Review of the Draft EA and FONSI for the Morris Operation DFPs, dated April 27, 2021. ADAMS Accession No. ML21110A164. U.S. Nuclear Regulatory Commission. Request for Additional Information on Morris Operation Decommissioning Funding Plans, dated June 15, 2021. ADAMS Accession No. ML21167A332. U.S. Nuclear Regulatory Commission. Response to Illinois Emergency Management Agency Comments on the Draft EA and FONSI for the Morris Operation DFPs, dated July 8, 2021. ADAMS Accession No. ML21182A107. U.S. Nuclear Regulatory Commission. Final EA and FONSI for the GE-Hitachi Nuclear Energy Initial and Updated DFPs Submitted in Accordance with 10 CFR 72.30(b) and (c) for the Morris Operation ISFSI, dated December 21, 2021. ADAMS Accession No. ML21216A274. GE Hitachi Nuclear Energy. GNF–A Fuel Fabrication Facility & GEH Morris Operation DFPs, dated December 14, 2012. ADAMS Package Accession No. ML123520161. GE Hitachi Nuclear Energy. Updated GEH Morris Operation DFP, dated December 11, 2015. ADAMS Package Accession No. ML15345A190. GE Hitachi Nuclear Energy. GEH Response to NRC Request for Additional Information—Morris Operation DFP, dated March 26, 2018. ADAMS Accession No. ML18085A656. GE Hitachi Nuclear Energy. Updated GEH Morris Operation DFP, dated December 14, 2018. ADAMS Package Accession No. ML18348A613. GE Hitachi Nuclear Energy. Updated GEH Morris Operation (MO) DFP, dated March 6, 2020. ADAMS Accession No. ML20066K270. GE Hitachi Nuclear Energy. GEH Response to Request for Additional Information for Acceptance Review of the Morris Operation SNM–2500 DFP, dated April 21, 2021. ADAMS Package Accession No. ML21111A333. GE Hitachi Nuclear Energy. Updated GEH Morris Operation (MO) DFP, dated June 17, 2021. ADAMS Package Accession No. ML21168A257. Illinois Emergency Management Agency. Review of the Draft EA and FONSI for the Morris Operation DFPs, dated June 4, 2021. ADAMS Accession No. ML21166A206. Illinois Emergency Management Agency. Response to the U.S. Nuclear Regulatory Commission's Review of the Illinois Emergency Management Agency's Comments of the Draft EA and FONSI for the Morris Operation DFPs, dated July 25, 2021. ADAMS Accession No. ML21214A073.

Dated: December 22, 2021.

For the Nuclear Regulatory Commission.

Yoira Diaz-Sanabria,

Chief, Storage and Transportation Licensing Branch, Division of Fuel Management, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2021–28278 Filed 12–28–21; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–382; NRC–2021–0224]

Entergy Operations, Inc; Waterford Steam Electric Station; Unit 3

AGENCY: Nuclear Regulatory Commission.

ACTION: Exemption; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has issued an exemption in response to an October 12, 2021, request from Entergy Operations, Inc., as supplemented on December 13, 2021. The licensee requested a one-time schedular exemption for Waterford Steam Electric Station, Unit 3, to postpone the current scheduled Emergency Preparedness (EP) biennial exercise until Calendar Year 2022. This postponement is due to the impact of Hurricane Ida on the Waterford site, the State of Louisiana and the local government agencies, as they continue to respond to the aftermath of the Hurricane Ida.

DATES: The exemption was issued on December 21, 2021.

ADDRESSES: Please refer to Docket ID NRC–2021–0224 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–2021–0224. Address questions about Docket IDs in Regulations.gov to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document. The request for the exemption was submitted by letter dated October 12, 2021 and is available in ADAMS under Accession Nos. ML21285A290.
- *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.

FOR FURTHER INFORMATION CONTACT: Jason J. Drake, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–8378, email: *Jason.Drake@nrc.gov.*

SUPPLEMENTARY INFORMATION: The text of the exemption is attached.

Dated: December 22, 2021.

For the Nuclear Regulatory Commission.

Jason J. Drake,

Project Manager, Plant Licensing Branch IV, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

Attachment—Exemption.

NUCLEAR REGULATORY COMMISSION

Docket No. 50–382; Entergy Operations, Inc.; Waterford Steam Electric Station, Unit 3 Exemption

I. Background.

Entergy Operations, Inc. (Entergy or the licensee) is the holder of Renewed Facility Operating License No. NPF–38, which authorizes operation of Waterford Steam Electric Station, Unit 3 (Waterford 3). The license provides, among other things, that the facility is subject to all rules, regulations, and orders of the U.S. Nuclear Regulatory Commission (NRC, the Commission) now or hereafter in effect. The facility consists of a single pressurized-water reactor located in Saint Charles Parish, Louisiana.

II. Request/Action.

Sections IV.F.2.b and IV.F.2.c of Appendix E, ''Emergency Planning and Preparedness for Production and Utilization Facilities,'' to Title 10 of the Code of Federal Regulations (10 CFR) Part 50 require the licensee at each site to conduct an exercise of its onsite emergency plan and of its offsite emergency plan biennially, with full or partial participation by each offsite authority having a role under the offsite plan. By letter dated October 12, 2021 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML21285A290), as supplemented by email dated December 13, 2021 (ADAMS Accession No. ML21349A224), the licensee requested a one-time exemption from these requirements that would allow the licensee to delay conduct of the biennial emergency preparedness (EP) exercise from October 26, 2021, to March 15, 2022. The licensee's request states that Hurricane Ida made landfall as a Category 4 hurricane near Port Fourchon, Louisiana, on Sunday, August 29, 2021, at 1155 hours Central Standard Time. Hurricane Ida brought damaging winds of 150 miles per hour, heavy rain, and caused loss of power and localized flooding to several areas within the State of Louisiana. Due to the significant widespread damage throughout the State, a Presidential Major Disaster Declaration occurred on August 30, 2021,[1] which included both St. John the Baptist Parish and St. Charles Parish as part of the 25 parishes able to receive additional Federal support.

The licensee states that a good faith effort to comply with the regulations has been made in that the biennial exercise was previously scheduled to be performed on October 26, 2021. However, Hurricane Ida making landfall in Southeast Louisiana caused widespread devastation and flooding throughout the Waterford 3 site and surrounding areas. The damage onsite required the station to direct all resources to perform hurricane recovery activities. With the amount of damage to the plant site, and the offsite response agencies notifying Entergy that they could not support the originally scheduled biennial EP exercise date due to the magnitude of destruction in their respective jurisdictions (Attachments 1, 2, and 3 in letter dated October 12, 2021), the decision was made to postpone the biennial EP exercise. In a letter to the Federal Emergency Management Agency (FEMA) dated September 8, 2021 (Attachment 4 in the letter dated October 12, 2021), the State of Louisiana, through the Louisiana Department of Environmental Quality (LDEQ), requested that FEMA postpone the exercise until the first quarter of CY 2022, citing the State's focus on ongoing recovery operations due to Hurricane Ida. The licensee states that it has made reasonable efforts to reschedule the biennial EP exercise during CY 2021 but described those efforts as being unsuccessful due to the magnitude of devastation experienced by St. Charles Parish and St. John the Baptist Parish because of Hurricane Ida.

III. Discussion.

Pursuant to 10 CFR 50.12, the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR Part 50, Appendix E, when: (1) The exemptions are authorized by law, will not present an undue risk to public health or safety, and are consistent with the common defense and security; and (2) when special circumstances are present.

[1] 4611–DR–LA Initial Notice, *https://www.fema.gov/disaster-federal-register-notice/4611-dr-la-initial-notice,* dated August 29, 2021.

A. The Exemption is Authorized by Law

This exemption would allow the licensee and offsite response organizations to accommodate Hurricane Ida's impacts upon their resources by postponing the exercise from the previously scheduled date of October 26, 2021, until March 15, 2022.

As stated above, 10 CFR 50.12 allows the NRC to grant exemptions from the requirements of 10 CFR Part 50, Appendix E. The NRC staff has determined that granting of the licensee's proposed exemption will not result in a violation of the Atomic Energy Act of 1954, as amended, or the Commission's regulations. Therefore, the exemption is authorized by law.

B. The Exemption Presents no Undue Risk to Public Health and Safety

The underlying purpose of 10 CFR Part 50, Appendix E, Sections IV.F.2.b and IV.F.2.c is to ensure that the emergency organization personnel are familiar with their duties, to identify and correct any weaknesses that may exist in the licensee's EP Program, and to test and maintain interfaces among affected State and local authorities and the licensee. In order to accommodate the scheduling of full participation exercises, the NRC has allowed licensees to schedule the exercises at any time during the calendar biennium. As stated previously, the last Waterford 3 full participation biennial EP exercise was conducted on November 20, 2019. Conducting the Waterford 3 full participation exercise on March 15, 2022, rather than in CY 2021, places the exercise outside of the required biennium. The licensee provided information in its letter dated October 12, 2021, that since the last biennial EP exercise on November 20, 2019, the licensee has conducted 27 internal tabletop exercises in addition to 3 workshops, 1 evaluated drill, and 38 training sessions that have involved interface with State and/or local authorities. These drills and training sessions did not exercise all of the proposed rescheduled onsite and offsite functions, but they do support the licensee's assertion that it has a continuing level of engagement to ensure that the emergency organization personnel are familiar with their duties, to identify and correct any weaknesses that may exist in the licensee's EP Program, and to test and maintain interfaces among affected State and local authorities and the licensee. The NRC staff has determined that by conducting these tabletop exercises, workshops, drill, and training sessions, the licensee has met the purpose

underlying the 10 CFR Part 50, Appendix E Sections IV.F.2.b and 2.c requirements.

Additionally, since the November 20, 2019, Waterford 3 exercise, the State of Louisiana Governor's Office of Homeland Security and Emergency Preparedness (GOHSEP) and LDEQ satisfactorily participated in a FEMA evaluated offsite participation only exercise for the River Bend Station on March 31, 2021 (ADAMS Accession No. ML21195A196). Also, on September 2, 2021, FEMA conducted a Disaster Initiated Review (ADAMS Accession No. ML21250A078) of the State of Louisiana and local offsite response organizations'' continued capability to respond to an incident at Waterford 3 following landfall of Hurricane Ida. Based on the review of this information, FEMA concluded that offsite radiological EP is adequate to provide reasonable assurance that appropriate measures can be taken to protect the health and safety of the public in the event of a radiological emergency at Waterford 3.

No new accident precursors are created by allowing the licensee to postpone the selected offsite portions of the exercise from CY 2021 until CY 2022. Thus, the probability and consequences of postulated accidents are not increased.

Therefore, there is no undue risk to public health and safety.

C. The Exemption is Consistent with Common Defense and Security

The proposed exemption would allow rescheduling of the biennial EP exercise from the previously scheduled date of October 26, 2021, until March 15, 2022. This change to the biennial EP exercise schedule has no relation to security issues. Therefore, the common defense and security is not impacted by the proposed exemption.

D. Special Circumstances

In order to grant exemptions in accordance with 10 CFR 50.12, special circumstances must be present. Special circumstances per 10 CFR 50.12 that apply to this exemption request are 10 CFR 50.12(a)(2)(ii) and (v). Special circumstances, per 10 CFR 50.12(a)(2)(ii), are present when: ''Application of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule.'' Section IV.F.2.b of Appendix E to 10 CFR Part 50 requires that each licensee conduct a subsequent exercise of its onsite emergency plan every 2 years, which may be included in the full participation biennial exercise required by Section IV.F.2.c. Sections IV.F.2.c of Appendix E to 10 CFR Part 50 require licensees to exercise offsite plans biennially, with full or partial participation by each offsite authority having a role under the plan. The underlying purposes of 10 CFR Part 50, Appendix E, Sections IV.F.2.b and IV.F.2.c are to ensure that the emergency organization personnel are familiar with their duties, to identify and correct any weaknesses that may exist in the licensee's EP Program, and to test and maintain interfaces among affected State and local authorities, and the licensee. No NRC findings were identified for the previous biennial EP exercise conducted on November 20, 2019 (ADAMS Accession No. ML20031E865), nor did FEMA identify any findings as part of its offsite evaluation (ADAMS Accession No. ML20062B335). As previously discussed, the licensee has conducted 27 internal tabletop exercises in addition to 3 workshops, 1 evaluated drill, and 38 training sessions that have involved interface with State and/or local authorities since the previous biennial exercise. The NRC staff has determined that these measures are adequate to satisfy the underlying purpose of the rule. Furthermore, although this one-time exemption in the exercise schedule would increase the interval between biennial exercises, the NRC has allowed licensees the flexibility to schedule their exercises at any time during the biennial calendar year as highlighted in Regulatory Issue Summary (RIS) 2006–003, ''Guidance on Requesting an Exemption from Biennial Emergency Preparedness Exercise Requirements,'' dated February 24, 2006 (ADAMS Accession No. ML053390039). RIS 2006–003 provides a 13-35-month window to schedule exercises while still meeting the biennial requirement. The licensees request of conducting the postponed exercise on the proposed March 15, 2022, date, falls within the 35-month window from the last exercise, which was conducted on November 20, 2019, thus meeting the intent of the regulation.

Under 10 CFR 50.12(a)(2)(v), special circumstances are present whenever the exemption would provide only temporary relief from the applicable regulation, and the licensee or applicant has made good faith efforts to comply with the regulation. The licensee has made a good faith effort to comply with the regulations in that the biennial exercise was scheduled to be performed on October 26, 2021. However, because of the effects of Hurricane Ida and the widespread flooding and devastation throughout the Waterford 3 facility and the surrounding areas, the Offsite Response Agencies (OROs) informed the licensee that they could not support the originally scheduled Exercise date due to the magnitude of destruction in their respective jurisdictions. Furthermore, the requested exemption to conduct the biennial EP exercise in 2022, instead of 2021, would grant only temporary relief from the applicable regulation. Additionally, the licensee has acknowledged returning to the previous biennial EP exercise schedule of every odd year and conducting the next follow-on biennial EP exercise in CY 2023.

Therefore, since the underlying purpose of 10 CFR Part 50, Appendix E, Sections IV.F.2.b and IV.F.2.c is achieved, the licensee has made a good faith effort to comply with the regulation, and the exemption would grant only temporary relief from the applicable regulation, the special circumstances required by 10 CFR 50.12(a)(2)(ii) and (v) exist for the granting of an exemption.

E. Environmental Considerations

NRC approval of the requested exemption is categorically excluded under 10 CFR 51.22(c)(25), and there are no extraordinary circumstances present that would preclude reliance on this exclusion. The NRC staff has determined, per 10 CFR 51.22(c)(25)(vi)(G) and (E), that the requirements from which the exemption is sought involve scheduling requirements and also involve education, training, experience, qualification, requalification, or other employment suitability requirements.

The NRC staff also determined that approval of this exemption involves no significant hazards consideration because it does not authorize any physical changes to the facility or any of its safety systems, change any of the assumptions or limits used in the licensee's safety analyses, or introduce any new failure modes. There is no significant change in the types or significant increase in the amounts of any effluents that may be released offsite because this exemption does not affect any effluent release limits as provided in the licensee's technical specifications or by the regulations in 10 CFR Part 20, ''Standards for Protection Against Radiation.'' There is no significant increase in individual or cumulative public or occupational radiation exposure because this exemption does not affect limits on the release of any radioactive material, or the limits provided in 10 CFR Part 20

for radiation exposure to workers or members of the public.

There is no significant construction impact because this exemption does not involve any changes to a construction permit. There is no significant increase in the potential for or consequences from radiological accidents because the exemption does not alter any of the assumptions or limits in the licensee's safety analysis. In addition, the NRC staff determined that there would be no significant impacts to biota, water resources, historic properties, cultural resources, or socioeconomic conditions in the region. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared in connection with the approval of the requested exemption.

IV. Conclusion.

Accordingly, the Commission has determined that, pursuant to 10 CFR 50.12, the exemption is authorized by law, will not present an undue risk to the public health and safety, and is consistent with the common defense and security. Also, special circumstances are present. Therefore, the Commission hereby grants Entergy Operations, Inc., an exemption from the requirements of 10 CFR Part 50, Appendix E, Sections IV.F.2.b and IV.F.2.c. to conduct the Waterford 3 biennial EP exercise required for CY 2021, permitting the exercise to be conducted in coordination with FEMA, NRC Region IV and Waterford 3 schedules by the licensee-provided date of March 15, 2022.

This exemption is effective upon issuance. This exemption expires on March 15, 2022, or when the biennial EP exercise is performed in CY 2022, whichever occurs first.

Dated at Rockville, Maryland, this 21st day of December 2021.

For the Nuclear Regulatory Commission.

/RA/

Bo M. Pham,

Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2021–28279 Filed 12–28–21; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 34446; File No. 812–15225]

Capital Group ETF Trust, et al.

December 22, 2021.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice.

Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from sections 2(a)(32), 5(a)(1), 22(d) and 22(e) of the Act and rule 22c–1 under the Act, and under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act, and under Section 12(d)(1)(J) of the Act for an exemption from sections 12(d)(1)(A) and 12(d)(1)(B) of the Act.

APPLICANTS: Capital Group ETF Trust (the ''Trust''), Capital Research and Management Company (the ''Adviser''), and American Funds Distributors, Inc. (the ''Distributor'').

SUMMARY OF APPLICATION: Applicants request an order (''Order'') that permits: (a) The Funds (defined below) to issue shares (''Shares'') redeemable in large aggregations only (''creation units''); (b) secondary market transactions in Shares to occur at negotiated market prices rather than at net asset value; (c) certain Funds to pay redemption proceeds, under certain circumstances, more than seven days after the tender of Shares for redemption; and (d) certain affiliated persons of a Fund to deposit securities into, and receive securities from, the Fund in connection with the purchase and redemption of creation units. The relief in the Order would incorporate by reference terms and conditions of the same relief of a previous order granting the same relief sought by applicants, as that order may be amended from time to time (''Reference Order'').[1]

FILING DATE: The application was filed on April 30, 2021, 2021 and amended on June 14, 2021 and August 25, 2021.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by emailing the Commission's Secretary at *Secretarys-Office@sec.gov* and serving applicants with a copy of the request by email. Hearing requests should be received by the Commission by 5:30 p.m. on January 17, 2022, 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 emailing the Commission's Secretary at *Secretarys-Office@sec.gov.*

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, *Secretarys-Office@sec.gov.* Applicants: Naseem Nixon, Capital Research Management Company, 333 South Hope Street, 50th Floor, Los Angeles, CA 90071; Michael W. Mundt, Stradley Ronon Stevens & Young, LLP, 2000 K Street NW, Suite 700, Washington, DC 20006.

FOR FURTHER INFORMATION CONTACT: Thankam A. Varghese, Senior Counsel or Joseph Toner, Acting Branch Chief (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or for an applicant using the Company name box, at *https://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicants

1. The Trust is a statutory trust organized under the laws of Delaware and will consist of one or more series operating as a Fund. The Trust is registered as an open-end management investment company under the Act. Applicants seek relief with respect to Funds (as defined below), including the Initial Fund (the ''Initial Fund''). The Funds will offer exchange-traded shares utilizing active management investment strategies as contemplated by the Reference Order.[2]

2. The Adviser, a Delaware corporation, will be the investment adviser to the Initial Fund. Subject to approval by the Trust's board of trustees, an Adviser (as defined below) will serve as investment adviser to the Funds. The Adviser is, and any other Adviser will be, registered as an investment adviser under the Investment Advisers Act of 1940

[1] Fidelity Beach Street Trust, et al., Investment Company Act Rel. Nos. 33683 (Nov. 14, 2019) (notice) and 33712 (Dec. 10, 2019) (order). Applicants are not seeking relief under Section 12(d)(1)(J) of the Act for an exemption from Sections 12(d)(1)(A) and 12(d)(1)(B) of the Act (the ''Section 12(d)(1) Relief''), and relief under Sections 6(c) and 17(b) of the Act for an exemption from Sections 17(a)(1) and 17(a)(2) of the Act relating to the Section 12(d)(1) Relief, except as necessary to allow a Fund's receipt of Representative ETFs included in its Tracking Basket solely for purposes of effecting transactions in Creation Units (as these terms are defined in the Reference Order), notwithstanding the limits of Rule 12d1–4(b)(3). Accordingly, to the extent the terms and conditions of the Reference Order relate to such relief, they are not incorporated by reference herein other than with respect to such limited exception.

[2] To facilitate arbitrage, among other things, each day a Fund will publish a basket of securities and cash that, while different from the Fund's portfolio, is designed to closely track its daily performance.

(''Advisers Act''). An Adviser may enter into sub-advisory agreements with other investment advisers to act as sub-advisers with respect to the Funds (each a ''Sub-Adviser''). Any Sub-Adviser to a Fund will be registered under the Advisers Act.

3. The Distributor is a California corporation and a broker-dealer registered under the Securities Exchange Act of 1934, as amended, and will act as the principal underwriter of Shares of the Initial Fund. Applicants request that the requested relief apply to any distributor of Shares, whether affiliated or unaffiliated with the Adviser and/or Sub-Adviser (included in the term ''Distributor''). Any Distributor will comply with the terms and conditions of the Order.

Applicants' Requested Exemptive Relief

4. Applicants seek the requested Order under section 6(c) of the Act for an exemption from sections 2(a)(32), 5(a)(1), 22(d) and 22(e) of the Act and rule 22c–1 under the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act and under Section 12(d)(1)(J) of the Act for an exemption from Sections 12(d)(1)(A) and 12(d)(1)(B) of the Act. The requested Order would permit applicants to offer Funds that operate as contemplated by the Reference Order. Because the relief requested is the same as certain of the relief granted by the Commission under the Reference Order and because the Adviser has entered into a licensing agreement with Fidelity Management & Research Company LLC, or an affiliate thereof, in order to offer Funds that operate as contemplated by the Reference Order,[3] the Order would incorporate by reference the terms and conditions of the same relief of the Reference Order.

5. Applicants request that the Order apply to the Initial Fund and to any other existing or future registered open-end management investment company or series thereof that: (a) Is advised by the Adviser or any entity controlling, controlled by, or under common control with the Adviser (any such entity included in the term ''Adviser''); (b) offers exchange-traded shares utilizing active management investment strategies as contemplated by the Reference Order; and (c) complies with the terms and conditions of the Order and the terms and conditions of the Reference Order that are incorporated by reference into the Order (each such company or series and each Initial Fund, a ''Fund'').[4]

6. Section 6(c) of the Act provides that the Commission may exempt any person, security or transaction, or any class of persons, securities or transactions, from any provisions of the Act, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Section 17(b) of the Act authorizes the Commission to exempt a proposed transaction from section 17(a) of the Act if evidence establishes that the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and the transaction is consistent with the policies of the registered investment company and the general purposes of the Act. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provision of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors. Applicants submit that for the reasons stated in the Reference Order the requested relief meets the exemptive standards under sections 6(c), 17(b) and 12(d)(1)(J) of the Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–28234 Filed 12–28–21; 8:45 am]

BILLING CODE 8011–01–P

[3] Certain aspects of how the Funds will operate (as described in the Reference Order) are the intellectual property of Fidelity Management & Research Company (or its affiliates).

[4] All entities that currently intend to rely on the Order are named as applicants. Any other entity that relies on the Order in the future will comply with the terms and conditions of the Order and the terms and conditions of the Reference Order that are incorporated by reference into the Order.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93865; File No. SR–NYSE–2021–68]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change To Revise the Suite of Complimentary Products and Services Offered to Listed Companies

December 23, 2021.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on December 13, 2021, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to revise the suite of complimentary products and services offered to listed companies pursuant to Section 902.07 [sic] of the NYSE Listed Company Manual. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

Products and Services Currently Provided Under Section 907.00

Section 907.00 of the NYSE Listed Company Manual sets forth complimentary products and services that issuers are entitled to receive in connection with their NYSE listing. The Exchange currently offers certain complimentary products and services and access to discounted third-party products and services through the NYSE Market Access Center to currently and newly listed issuers. The Exchange also provides complimentary market surveillance products and services (with a commercial value of approximately $55,000 annually), Web-hosting products and services (with a commercial value of approximately $16,000 annually), Web-casting services (with a commercial value of approximately $6,500 annually), market analytics products and services (with a commercial value of approximately $30,000 annually), and news distribution products and services (with a commercial value of approximately $20,000 annually).

The products and services are offered to Eligible New Listings [4] and Eligible Transfer Companies [5] based on the following tiers: [6]

Tier A: For Eligible New Listings and Eligible Transfer Companies with a global market value of $400 million or more, in each case calculated as of the date of listing on the Exchange, the Exchange offers market surveillance, market analytics, Web-hosting, Web-casting, and news distribution products and services for a period of 48 calendar months.

Tier B: For Eligible New Listings and Eligible Transfer Companies with a global market value of less than $400 million, in each case calculated as of the date of listing on the Exchange, the Exchange offers Web-hosting, market analytics, Web-casting, and news distribution products and services for a period of 48 calendar months.

The products and services are offered to currently listed companies that meet the eligibility requirements (''Eligible Current Listings'') based on the following tiers:

Tier One: The Exchange offers (i) a choice of market surveillance or market analytics products and services, and (ii) Web-hosting and Web-casting products and services to U.S. issuers that have 270 million or more total shares of common stock issued and outstanding in all share classes, including and in addition to Treasury shares, and non-U.S. companies that have 270 million or more shares of an equity security issued and outstanding in the U.S., each calculated annually as of September 30 [7] of the preceding year.

Tier Two: At each such issuer's election, the Exchange offers a choice of either: (1) Market analytics; or (2) Web-hosting and Web-casting products to:

(1) U.S. issuers that have 160 million to 269,999,999 total shares of common stock issued and outstanding in all share classes, including and in addition to Treasury shares, calculated annually as of September 30 [8] of the preceding year; and

(2) non-U.S. companies that have 160 million to 269,999,999 shares of an equity security issued and outstanding in the U.S., calculated annually as of September 30 [9] of the preceding year.

In addition to the foregoing, the Exchange provides all listed issuers with complimentary access to whistleblower hotline services (with a commercial value of approximately $4,000 annually) for a period of 24 calendar months.

Proposed Amendments to Section 907.00

The Exchange proposes to amend Section 907.00. Once the amendments described herein are approved, Eligible Current Listings will be entitled on a prorated annual basis to a new suite of products and services starting on the first day of the first calendar month after the approval date for the proposed amendments.[10] Eligible New Listings and Eligible Transfer Companies will receive the proposed new suite of products and services if they list on or after the date this proposal is approved by the SEC.[11]

Issuers are not required as a condition of listing to utilize the complimentary products and services available to them pursuant to Section 907.00 and issuers may decide to contract themselves for other products and services. Companies receiving products and services as Eligible New Listings or Eligible Transfer Companies [12] that list before the operative date will continue to be eligible to receive the products and services for which they are eligible under the rule as in effect before that date.

Modified List of Products and Services

The Exchange proposes to amend the suite of products and services provided under Section 907.00. As amended, the suite of available products and services would be as follows: Market intelligence (with a maximum commercial value of approximately $50,000 annually), market analytics (with a maximum commercial value of approximately $30,000 annually), board of directors platform (with a maximum commercial value of approximately $40,000 annually), virtual event platform (with a maximum commercial value of approximately $30,000 annually), environmental, social and governance tools (collectively ''ESG'') (with a maximum commercial value of approximately $30,000 annually), Web-

[4] For purposes of Section 907.00, the term ''Eligible New Listing'' means (i) any U.S. company that lists common stock on the Exchange for the first time and any non-U.S. company that lists an equity security on the Exchange under Section 102.01 or 103.00 of the Manual for the first time, regardless of whether such U.S. or non-U.S. company conducts an offering and (ii) any U.S. or non-U.S. company emerging from a bankruptcy, spinoff (where a company lists new shares in the absence of a public offering), and carve-out (where a company carves out a business line or division, which then conducts a separate initial public offering).

[5] For purposes of Section 907.00, the term ''Eligible Transfer Company'' means any U.S. or non-U.S. company that transfers its listing of common stock or equity securities, respectively, to the Exchange from another national securities exchange. For purposes of Section 907.00, an ''equity security'' means common stock or common share equivalents such as ordinary shares, New York shares, global shares, American Depository Receipts, or Global Depository Receipts.

[6] Section 907.00 provides for separate service entitlements for Acquisition Companies listed under Section 102.06 and the issuers of Equity Investment Tracking Stocks listed under Section 102.07.

[7] A U.S. issuer or non-U.S. company that has the requisite number of shares outstanding on September 30 will begin (or continue, as the case may be) to receive the suite of complimentary products and services for which it is eligible as of the following January 1. In the event that a U.S. issuer or non-U.S. company completes a corporate action between October 1 and December 31 that increases the number of shares it has outstanding, the Exchange will calculate its outstanding shares as of December 31 and determine whether it has become eligible to receive Tier One or Tier Two services. If eligible, the Exchange will offer such services as of the immediately succeeding January 1.

[8] *Id.*

[9] *Id.*

[10] The current form of Section 907.00 will remain in the Manual and be applicable to Eligible Current Listings for the period beginning January 1, 2022 through the end of the calendar month in which these proposed amendments are approved. During that period, Eligible Current Listings will be entitled to receive the annual suite of products and services currently set forth in Section 907.00, on a prorated basis. Eligible New Listings and Eligible Transfer Companies that list prior to approval of the proposed amendments will be entitled to the suite of products and services for which they are eligible under Section 907.00 in its current form.

[11] *Id.*

[12] The Exchange is not proposing to change the definitions of Eligible New Listings and Eligible Transfer Companies.

hosting and Web-casting products and services (with a maximum commercial value of approximately $25,000 annually), and news distribution products and services (with a maximum commercial value of approximately $20,000 annually).[13]

The proposed services offering includes market intelligence, rather than market surveillance in the current rule. This change reflects a change over time in the scope of the types of service packages offered by the service providers from whom the Exchange purchases these services. Historically, those packages were generally limited to providing surveillance services, which consisted of monitoring an issuer's larger shareholders and how the size of their holdings changed over time. These service providers now also provide additional information that is intended to track investors'' views about an issuer and how those views change over time. As this additional service is included in the package provided to listed companies, the Exchange believes it is appropriate to reflect that fact by changing the terminology from market surveillance to market intelligence. The small decrease in the value attributed to this service is a result of pricing competition in a highly competitive market for these services.

The current rule treats Web-hosting and Web-casting services as two separate items in the suite of available services, while the proposed rule amendments aggregate them as a single option. The Exchange is making this change in response to developments over time in how its service providers package their service offerings, as service providers now market these two services together rather than separately. The aggregate value of Web-hosting and Web-casting services would increase slightly due to increased prices charged by service providers.

In certain cases, the proposed rule amendments adopt a different approach from the current rule in how it gives companies the ability to choose the services they receive. The current rule is structured to give listed companies a choice among the various service categories, where choosing a particular service requires the company to forego another service category entirely (for example, a company with Tier One eligibility can choose either market surveillance or market analytics products and services but cannot receive both). The proposed rule amendments adopt a more flexible approach for: (i) Eligible New Listings and Eligible Transfers that qualify for Tier A; and (ii) currently listed companies that qualify for Tier One. In these cases, companies will be eligible to choose different levels of services from the different categories, subject to a maximum overall value of services used. The Exchange believes that this approach will provide companies with appropriate flexibility in choosing the types and levels of service that best meet their needs, while providing that all qualified companies within a tier are entitled to receive the same dollar value of services.

Amended Offering for Eligible New Listings and Eligible Transfers

The proposed amended offering of products and services for Eligible New Listings and Eligible Transfers would be as follows:

Tier A: For a period of 48 calendar months, Eligible New Listings and Eligible Transfer Companies that list on the Exchange after approval of these amendments with a global market value of $400 million or more, in each case calculated as of the date of listing on the Exchange, the Exchange offers products and services with a maximum combined commercial value of approximately $125,000 annually, consisting of (i) Web-hosting and Web-casting products and services and (ii) news distribution products and services and (iii) a selection from among a suite of products and services, including market intelligence, market analytics, board of directors platform, virtual event platform, or ESG products and services.

Tier B: For a period of 48 calendar months, Eligible New Listings and Eligible Transfer Companies that list on the Exchange after approval of these amendments with a global market value of less than $400 million, in each case calculated as of the date of listing on the Exchange, the Exchange offers (i) Web-hosting and Web-casting products and services; (ii) market analytics; and (iii) news distribution products and services.

The methodology used for determining global market value under the proposed amended rule for an Eligible New Listing or Eligible Transfer Company would be the same as is used under the current rule.

Amended Offering for Currently Listed Companies

The proposed amended offering of products and services for Eligible Current Listings would be as follows:

Tier One: For U.S. issuers that have 270 million or more total shares of common stock issued and outstanding in all share classes, including and in addition to Treasury shares, and non-U.S. companies that have 270 million or more shares of an equity security issued and outstanding in the U.S., each calculated annually as of September 30 of the preceding year, the Exchange would offer products and services with a maximum combined commercial value of approximately $75,000 annually, consisting of (i) Web-hosting and Web-casting products and services and (ii) a selection from among a suite of products and services, including market intelligence, market analytics, board of directors platform, virtual event platform, or ESG products and services.

Tier Two: At each issuer's election, the Exchange would offer a choice of: (i) Market analytics; (ii) Web-hosting and Web-casting products; or (iii) virtual event platform to:

(1) U.S. issuers that have 160 million to 269,999,999 total shares of common stock issued and outstanding in all share classes, including and in addition to Treasury shares, calculated annually as of September 30 of the preceding year; and

(2) non-U.S. companies that have 160 million to 269,999,999 shares of an equity security issued and outstanding in the U.S., calculated annually as of September 30 of the preceding year.

The methodology used in determining the number of shares issued and outstanding for purposes of eligibility for Tier One or Tier Two would be the same as under the current rule.

Proposal To Adjust Entitlements of Currently Listed Companies After January 1

The Exchange proposes to grant enhanced eligibility for products and services under Section 907.00 to companies that become eligible during the course of a calendar year. In the event that a U.S. issuer or non-U.S. company completes a corporate action during the course of a calendar year for which its eligibility for services is being determined and that corporate action increases the number of shares it has outstanding, the Exchange would calculate its outstanding shares immediately after such corporate action and determine whether it has become eligible to receive Tier One or Tier Two

[13] The proposed rule amendments do not refer to these products and services being provided through the Exchange's Market Access Center, as is the case in the comparable description in the current rule. This does not reflect any change in the nature of the services to be provided or how issuers will access those services. The Market Access Center concept was simply a way of identifying the entire suite of available products and services and promoting their availability to issuers. The Exchange no longer emphasizes this approach in communicating with issuers about the products and services and therefore proposes to remove the reference to the Market Access Center from Section 907.00.

services. If eligible, the Exchange would offer such services for the remainder of that calendar year, with such eligibility commencing as of the beginning of the following calendar month.

Period of Eligibility for Whistleblower Services

The Exchange currently provides all listed issuers with complimentary access to whistleblower hotline services (with a commercial value of approximately $4,000 annually) for a period of 24 calendar months. The Exchange proposes to extend this period of eligibility to 48 months.

The specific tools and services offered to Eligible New Listings and Eligible Transfer Companies and eligible currently listed companies as part of the complimentary offering limited to those categories of issuers under Section 907.00 are provided solely by third-party vendors. In deciding which complimentary products and services to provide, the NYSE considers the quality of competing products and services and the needs of its listed issuers in selecting the vendors. The NYSE may change vendors from time to time based on this ongoing review of the products and services provided by current vendors and its willingness to change vendors is consistent with competition for vendor services.

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. In this regard, NYSE notes that it may choose to use multiple vendors for the same type of product or service. The NYSE also notes that, from time to time, issuers elect to purchase products and services from other vendors at their own expense instead of accepting the products and services described above offered by the Exchange.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act'') generally.[14] Section 6(b)(4)[15] requires that exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using the facilities of an exchange. Section 6(b)(5)[16] requires, among other things, that exchange rules promote just and equitable principles of trade and that they are not designed to permit unfair discrimination between issuers, brokers, or dealers. Section 6(b)(8)[17] prohibits any exchange rule from imposing any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The NYSE faces competition in the market for listing services, and competes, in part, by offering valuable services to companies. The Exchange believes that it is reasonable to offer complimentary services to attract and retain listings as part of this competition.

The Exchange does not believe that the proposal to modify the suite of complimentary products and services it provides to eligible listed companies harms the market for those products and services in a way that constitutes a burden on competition or an inequitable allocation of fees or fails to promote just and equitable principles of trade, in a manner inconsistent with the Act. The specific tools and services offered to eligible listed companies as part of the complimentary offering under Section 907.00 are provided solely by third-party vendors. As noted above, issuers are not required to utilize the complimentary products and services and some issuers have selected competing products and services. The NYSE believes that its consideration of quality and the needs of its listed issuers in selecting the vendors and its willingness to change vendors is consistent with competition for vendor services. In this regard, the NYSE notes that it may choose to use multiple vendors for the same type of product or service. The NYSE also notes that, from time to time, issuers elect to purchase products and services from other vendors at their own expense instead of accepting the products and services described above offered by the Exchange.

The proposed rule amendments make a number of adjustments in the types and levels of products and services provided to companies. Those adjustments are minor in nature and generally reflect changes in which the service providers on which the Exchange relies package their products and services. Nor is there any significant change in the overall value of the services to which any company would be entitled. Consequently, the Exchange believes that the proposed amendments to the available products and services, and the terms on which they are offered, represent an equitable allocation of the services provided under the rule and is not unfairly discriminatory.

The proposed rule amendments provide that (i) Eligible New Listings and Eligible Transfers that qualify for Tier A; and (ii) currently listed companies that qualify for Tier One will, in each case, be eligible to choose different levels of services from the different categories subject to a maximum overall value of services used. The Exchange believes that this approach is not unfairly discriminatory as it simply provides companies with appropriate flexibility in choosing the types and levels of service that best meet their needs while ensuring that all qualified companies within a tier are entitled to receive the same dollar value of services.

The proposed rule amendments provide for the ability of companies to qualify for Tier One or Tier Two services during the course of a calendar year and receive those services on a prorated basis for the balance of that calendar year. As these companies would only become eligible if they met the same shares outstanding requirements as companies that were already receiving the services of the applicable tier, the Exchange believes that this proposed amendment represents an equitable allocation of the services provided under the rule and is not unfairly discriminatory.

Finally, the Exchange also believes it is reasonable to balance its need to remain competitive with other listing venues, while at the same time ensuring adequate revenue to meet its regulatory responsibilities. The Exchange notes that no other company will be required to pay higher fees because of this proposal, and it represents that providing the proposed services will have no impact on the resources available for its regulatory programs.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. As noted above, the Exchange faces competition in the market for listing services, and competes, in part, by offering valuable services to companies. The proposed rule change reflects that competition, but it does not impose any burden on the competition with other exchanges. Rather, the Exchange believes the proposed changes will enhance competition for listings, as it will increase the competition for new listings and the listing of companies that are currently listed on other exchanges. Other exchanges can also offer similar services to companies, thereby

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(4).

[16] 15 U.S.C. 78f(b)(5).

[17] 15 U.S.C. 78f(b)(8).

increasing competition to the benefit of those companies and their shareholders. Accordingly, the Exchange does not believe the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

In addition, the Exchange does not believe that the proposal to modify the suite of complimentary products and services it provides to eligible listed companies will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. In this regard, the NYSE notes that the specific tools and services offered to eligible listed companies as part of the complimentary offering limited to those categories of issuers under Section 907.00 are provided solely by third-party vendors. In addition, the NYSE may choose to use multiple vendors for the same type of product or service. The NYSE also notes that currently listed and newly listed companies would not be required to accept the offered products and services from the NYSE, and an issuer's receipt of an NYSE listing is not conditioned on the issuer's acceptance of such products and services. In addition, the NYSE notes that, from time to time, issuers elect to purchase products and services from other vendors at their own expense instead of accepting the products and services described above offered by the Exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2021–68 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–NYSE–2021–68. 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/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2021–68 and should be submitted on or before January 19, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2021–28326 Filed 12–28–21; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93850; File No. SR–NYSE–2021–75]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend its Rules To Add New Subparagraph (i)(6) to Rule 7.31

December 22, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 16, 2021, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its rules to (1) add new subparagraph (i)(6) to Rule 7.31 (Orders and Modifiers) regarding orders designated with a ''retail'' modifier and (2) delete current Rule 13 (Retail Modifier). The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries,

[18] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its rules to (1) add new subparagraph (i)(6) to Rule 7.31 (Orders and Modifiers) regarding orders designated with a ''retail'' modifier and (2) delete current Rule 13 (Retail Modifiers).

Proposed Rule Change

Currently, the Exchange's Rule 13 (Retail Modifiers) permits member organizations to designate an order with a ''retail'' modifier. Such orders, if properly designated, are eligible for ''Retail Modifier'' rates available for such orders on the Exchange's Price List.[3]

The Exchange proposes to move the text of Rule 13 to the Exchange's Pillar rules, and specifically, to new subparagraph (i)(6) to Rule 7.31 (Orders and Modifiers), and to make modifications to the rule text to conform it to rules currently in effect on its affiliate exchanges NYSE American LLC (''NYSE American'')[4] and NYSE National, Inc. (''NYSE National'').[5] The Exchange does not propose any changes to the fees applicable to orders designated with a ''retail'' modifier.

Proposed Rule 7.31(i)(6)

Proposed Rule 7.31(i)(6)(A) would specify that an order designated with a ''retail'' modifier is an agency order or a riskless principal order that meets the criteria of FINRA Rule 5320.03 that originates from a natural person and is submitted to the Exchange by a member organization, provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology. It would also specify that an order with a ''retail'' modifier is separate and distinct from a ''Retail Order'' under Rule 7.44. This proposed rule is based on the Exchange's current Rule 13(f)(2)(A) without any differences, except that the cross-reference in Rule 13 to former Rule 107C (Retail Liquidity Program) would be updated to instead cross-reference Rule 7.44 (Retail Liquidity Program).

Proposed Rule 7.31(i)(6)(B) would specify that a member organization would be required to designate an order as ''retail'' in the form and/or manner prescribed by the Exchange. This proposed rule is based on the Exchange's current Rule 13(f)(2)(B) without any differences, except that the introductory language '' 'Retail' modifier designation'' would be deleted.

Proposed Rule 7.31(i)(6)(C) would specify that in order to submit an order with a ''retail'' modifier, a member organization must submit an attestation, in a form prescribed by the Exchange, that substantially all orders designated as ''retail'' would meet the requirements set out in paragraph (A) above. This proposed rule is based on the Exchange's current Rule 13(f)(2)(C) without any differences, except that the Exchange proposes to change the phrase ''submitted as 'retail' '' to ''designated as 'retail,' '' to conform the rule text to that of NYSE American Rule 7.31E(i)(4)(C) and NYSE National Rule 7.31(i)(4)(C).

Proposed Rule 7.31(i)(6)(D) would specify that a member organization must have written policies and procedures reasonably designed to assure that it will only designate orders as ''retail'' if all requirements of Rule 7.31(i)(6)(A) are met. Such written policies and procedures must require the member organization to (i) exercise due diligence before entering a ''retail'' order to assure that entry as a ''retail'' order is in compliance with the requirements specified by the Exchange, and (ii) monitor whether orders entered as ''retail'' orders meet the applicable requirements. If a member organization represents ''retail'' orders from another broker-dealer customer, the member organization's supervisory procedures must be reasonably designed to assure that the orders it receives from such broker-dealer customer that it designates as ''retail'' orders meet the definition of a ''retail'' order. The member organization must (i) obtain an annual written representation, in a form acceptable to the Exchange, from each broker-dealer customer that sends it orders to be designated as ''retail'' orders'' that entry of such orders as ''retail'' orders will be in compliance with the requirements specified by the Exchange, and (ii) monitor whether its broker-dealer customer's ''retail'' order flow meets the applicable requirements. This proposed rule is based on the Exchange's current Rule 13(f)(2)(D) without any differences.

Proposed Rule 7.31(i)(6)(E) would specify that a member organization that fails to abide by the requirements specified in paragraphs (i)(6)(A)–(D) of Rule 7.31 would not be eligible for the ''Retail Modifier'' rates for orders it designates as ''retail'' orders. This proposed rule is based on NYSE American Rule 7.31E(i)(4)(E) and NYSE National Rule 7.31(i)(4)(E) with the following non-substantive differences: The proposed rule (i) would use the term ''member organization'' instead of ''ETP Holder,'' and, (ii) because the Exchange operates a Retail Liquidity Provider Program (''RLP'') pursuant to Rule 7.44 that separately defines the term ''Retail Order,'' the proposed rule would use the terms ''order designated as 'retail'' or ''Retail Modifier'' instead of the term ''Retail Order.''[6]

Deletion of Rule 13

Because the Exchange is relocating current Rule 13 to proposed Rule 7.31(i)(6) and such subsection would define the term ''Retail Modifier'' and corresponding requirements, the Exchange proposes to delete Rule 13 in its entirety.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[7] in general, and furthers the objectives of Sections 6(b)(5) of the Act,[8] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the

[3] These requirements are distinct from, but related to, the Exchange's requirements for a ''Retail Order'' under its Retail Liquidity Program pursuant to Rule 7.44.

[4] *See* Securities Exchange Act Release No. 92254 (June 24, 2021), 86 FR 34819 (June 30, 2021) (SR–NYSEAMER–2021–31) (notice of filing and immediate effectiveness of proposed rule change to add the ''retail'' order modifier to NYSE American Rule 7.31E(i)(4)).

[5] *See* Securities Exchange Act Release No. 92446 (July 20, 2021), 86 FR 40108 (July 26, 2021) (SR–NYSENAT–2021–15) (notice of filing and immediate effectiveness of proposed rule change to add the ''retail'' order modifier to NYSE National Rule 7.31(i)(4)).

[6] The Exchange does not propose to copy text from Rule 13(f)(2)(E) or (F) into the Rule 7.31(i)(6) definition of ''Retail Modifier.'' Those sections provide that a member organization that fails to abide by the requirements pertaining to orders designated as ''retail'' will be ''disqualified'' from submitting ''retail'' orders, which disqualification the member organization may appeal. The Exchange believes that the appropriate consequence for incorrectly designating an order with a ''retail'' modifier would be that such orders would be ineligible for preferential ''retail'' fees, as proposed Rule 7.31(i)(6)(E) would provide. Such orders would still be eligible to trade pursuant to the non-''retail'' fees in the Exchange's Price List.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

public interest and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that moving the text described above from Rule 13 to new subparagraph (i)(6) of Rule 7.31 would remove impediments to and perfect the mechanism of a free and open market and a national market system by bringing the Exchange's rule for ''retail'' modifiers into Rule 7.31, the Exchange's Pillar rule regarding Orders and Modifiers. Relocating the rule text regarding ''retail'' modifiers into Rule 7.31 and deleting Rule 13 would eliminate any potential confusion among market participants regarding the availability of the ''retail'' modifier for orders on the Exchange's Pillar trading system.

The Exchange believes that the requirements specified in proposed Rule 7.31(i)(6) regarding the proposed designation of ''retail'' orders, along with the requirements for member organization attestations and written policies and procedures, would remove impediments to and perfect the mechanism of a free and open market and a national market system because they are substantively identical to the requirements for designating orders as ''retail'' on NYSE American and NYSE National, and therefore would harmonize the requirements for designating orders as ''retail'' across the three affiliated exchanges. Such uniformity will enhance market participants' understanding of the process for designating orders as ''retail'' across the exchanges, and will minimize any potential confusion that could result from having slightly different programs on each exchange.

The Exchange believes that it would remove impediments to and perfect the mechanism of a free and open market and a national market system to omit text from Rule 13(f)(2)(E) and (F) from proposed Rule 7.31(i)(6). The Exchange believes that the proposed change providing that orders that fail to meet the ''retail'' modifier requirements would be ineligible for such preferential fees would remove impediments to and perfect the mechanism of a free and open market system, because orders failing to meet the requirements of ''retail'' orders would not receive the corresponding pricing benefits. Orders failing to meet the requirements of ''retail'' orders would still be eligible to trade pursuant to the non-''retail'' prices in the Exchange's Price List.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[9] the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not intended to address competition at all, but merely moves, with minor changes, the Exchange's existing rule for designating orders as ''retail'' into the Exchange's Pillar rule regarding Orders and Modifiers.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [10] and Rule 19b–4(f)(6) [11] thereunder.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [12] of the Act to determine whether the proposed rule change should be approved or disapproved.

[9] 15 U.S.C. 78f(b)(8).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least give business days prior to the date of filing of the propose rule change, or such short time as designated by the Commission. The Exchange has satisfied this requirement.

[12] 15 U.S.C. 78s(b)(2)(B).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2021–75 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–NYSE–2021–75. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2021–75, and should be submitted on or before January 19, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–28245 Filed 12–28–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93854; File No. SR–DTC–2021–017]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing of Proposed Rule Change To Enhance Capital Requirements and Make Other Changes

December 22, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 13, 2021, The Depository Trust Company (''DTC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the clearing agency. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change consists of amendments to the Rules, By-Laws and Organization Certificate (''Rules'') of DTC in order to (i) enhance DTC's capital requirements for Participants, (ii) redefine DTC's Watch List and eliminate DTC's enhanced surveillance list and (iii) make certain other clarifying, technical and supplementary changes in the Rules, including definitional updates, to accomplish items (i) and (ii), as described in greater detail below.[3]

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the clearing agency included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The clearing agency has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to (i) enhance DTC's capital requirements for Participants, (ii) redefine DTC's Watch List and eliminate DTC's enhanced surveillance list and (iii) make certain other clarifying, technical and supplementary changes in the Rules, including definitional updates, to accomplish items (i) and (ii).

(i) Background

Central securities depositories (''CSDs'') play a key role in financial markets by mitigating counterparty credit risk on transactions of their participants. As a CSD, DTC is exposed to the credit risks of its Participants. The credit risks borne by DTC are mitigated, in part, by the capital maintained by Participants, which serves as a loss-absorbing buffer.

In accordance with Section 17A(b)(4)(B) of the Exchange Act,[4] a registered clearing agency such as DTC may, among other things, deny participation to, or condition the participation of, any person on such person meeting such standards of financial responsibility prescribed by the rules of the registered clearing agency.

In furtherance of this authority, DTC requires applicants and Participants to meet the relevant financial responsibility standards prescribed by the Rules. These financial responsibility standards generally require Participants to have and maintain certain levels of capital, as more particularly described in the Rules and below.

DTC's capital requirements for Participants have not been updated in over 20 years. Since that time, there have been significant changes to the financial markets that warrant DTC revisiting its capital requirements. For example, the regulatory environment within which DTC and its Participants operate has undergone various changes. The implementation of the Basel III standards,[5] the designation of many banks as systemically important by the Financial Stability Board,[6] as well as the designation of DTC as a systemically important financial market utility (''SIFMU'') by the Financial Stability Oversight Council,[7] have significantly increased the regulatory requirements, including capital requirements, of many financial institutions and CSDs. Similarly, the Covered Clearing Agency Standards (''CCAS'') adopted by the Commission have raised the regulatory standards applicable to CSDs such as DTC.[8]

There also have been significant Participant changes over the past 20 years. Numerous mergers, acquisitions, and new market entrants have created a diverse group of Participants that has expanded the credit-risk profiles that DTC must manage.

Moreover, transaction values at DTC have increased significantly over the years.[9] Although the increase does not present more risk to DTC directly, as DTC's services are nonguaranteed and fully collateralized, DTC does have an interest in ensuring that its Participants have a certain minimum amount of capital to help support the increased activity.

Although these factors do not directly require DTC to increase capital requirements for Participants (*e.g.,* there is no specific regulation or formula that prescribes a set capital requirement for participants of a CSD such as DTC), the overarching and collective focus of the regulatory changes noted above, in light of the many heightened risks to the financial industry, has been to increase the stability of the financial markets in order to reduce systemic risk. As a self-regulatory organization, a SIFMU, and being exposed to the new and increased risks over the past 20 years, DTC has a responsibility to do the same. Enhancing its capital requirements helps meet that responsibility and improve DTC's credit risk management. Enhanced capital requirements also help mitigate other risks posed directly or indirectly by Participants such as legal risk, operational risk and cyber risk, as better capitalized Participants have greater financial resources in order

[13] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Capitalized terms not defined herein are defined in the Rules, *available at https://www.dtcc.com/~/media/Files/Downloads/legal/rules/dtc_rules.pdf.*

[4] 15 U.S.C. 78q–1(b)(4)(B).

[5] Basel Committee on Banking Supervision, The Basel Framework, *available at https://www.bis.org/basel_framework/index.htm?export=pdf* (''Basel III Standards'').

[6] *See* Financial Stability Board, 2021 list of global systemically important banks, *available at https://www.fsb.org/wp-content/uploads/P231121.pdf.*

[7] *See* U.S. Department of the Treasury, Designations, Financial Market Utility Designations, *available at https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/fsoc/designations.*

[8] 17 CFR 240.17Ad–22(e).

[9] *See, e.g.,* DTCC Annual Reports, *available at https://www.dtcc.com/about/annual-report.* DTC is a wholly owned subsidiary of The Depository Trust & Clearing Corporation (''DTCC''). The DTCC Annual Reports highlight and track DTC transactional values year-over-year.

to mitigate the effects of these and other risks.

As for setting the specific capital requirements proposed, again, there is no regulation or formula that requires or calculates a specific amount (*i.e.,* there is no magic number). Instead, DTC considered several factors, including inflation and the capital requirements of other Financial Market Infrastructures (''FMIs''), both in the U.S. and abroad, to which the proposed requirements align.[10]

In light of these and other developments described below, DTC proposes to enhance its capital requirements for Participants, as described in more detail below.

DTC also proposes to redefine the Watch List, which is a list of Participants that are deemed by DTC to pose a heightened risk to it and its Participants based on credit ratings and other factors. As part of the redefinition of the Watch List, DTC proposes to eliminate the separate enhanced surveillance list and implement a new Watch List that consists of a relatively smaller group of Participants that exhibit heightened credit risk, as described in more detail below.

(ii) Current DTC Capital Requirements

The current DTC capital requirements for Participants are set forth in DTC's Policy Statements on the Admission of Participants and Pledgees (the ''Policy Statement'').[11]

Policy Statement

The Policy Statement is divided into three sections. Section 1 of the Policy Statement concerns entities organized in the U.S. (''U.S. entities'') applying to become Participants. Section 2 of the Policy Statement concerns entities organized in a country other than the U.S. and that are not otherwise subject to U.S. federal or state regulation (''non-U.S. entities'') applying to become Participants. Section 3 of the Policy Statement concerns fees and time limits on applications to become a Participant or Pledgee.

As relevant to DTC's proposal to enhance its capital requirements for Participants:

Section 1

Section 1 of the Policy Statement provides that Rules 2 (Participants and Pledgees) and 3 (Participants Qualifications) set forth the basic standards for the admission of Participants, including that the admission of a Participant is subject to an applicant's demonstration that it meets reasonable standards of financial responsibility, operational capability, and character at the time of its application and on an ongoing basis thereafter.

Section 1 of the Policy Statement provides that any applicant that satisfies the qualifications for eligibility to become a Participant set forth under subsections (d) or (h)(ii) of Section 1 of Rule 3 must comply with minimum financial resource requirements in order to qualify to be admitted, and continue in good standing, as a Participant.

Subsection (d) of Section 1 of Rule 3 provides that a bank or trust company which is subject to supervision or regulation pursuant to the provisions of federal or state banking laws, or any subsidiary of such a bank or trust company or a bank holding company or any subsidiary of a bank holding company, is eligible to become a Participant.

Pursuant to the Policy Statement, any applicant or Participant that satisfies the qualifications of subsection (d) of Section 1 of Rule 3 is required to maintain equity capital in the amount of at least $2 million based on the definition of equity capital provided in the form and instructions of the Consolidated Report of Conditions and Income maintained by the Federal Financial Institutions Examination Council.

Subsection (h)(ii) of Section 1 of Rule 3 provides that a broker-dealer registered under the Exchange Act is eligible to become a Participant.

Pursuant to the Policy Statement, any applicant or Participant that satisfies the qualifications of subsection (h)(ii) of Section 1 of Rule 3 is required to maintain a minimum amount of not less than $500,000 in excess net capital over the greater of (i) the minimum capital requirement imposed on it pursuant to Exchange Act Rule 15c3–1, or (ii) such higher minimum capital requirement imposed by the registered broker-dealer's designated examining authority.

Section 2

Section 2 of the Policy Statement provides that non-U.S. entities are eligible to become Participants.

Section 2 of the Policy Statement requires that non-U.S. entities applying to become Participants provide to DTC, for financial monitoring purposes, audited financial statements prepared in accordance with U.S. generally accepted accounting principles (''U.S. GAAP'') or other generally accepted accounting principles that are satisfactory to DTC.

In order to address the risk presented by the acceptance of financial statements not prepared in accordance with U.S. GAAP, Section 2 of the Policy Statement provides that the minimum financial requirements applicable to a non-U.S. entity will be subject to a specified premium, as follows:

i. For financial statements prepared in accordance with International Financial Reporting Standards, the U.K. Companies Act of 1985 (''U.K. GAAP''), or Canadian generally accepted accounting principles—a premium of 1½ times the minimum financial requirements;

ii. for financial statements prepared in accordance with a European Union country's generally accepted accounting principles, other than U.K. GAAP—a premium of 5 times the minimum financial requirements; and

iii. for financial statements prepared in accordance with any other type of generally accepted accounting principles—a premium of 7 times the minimum financial requirements.

Accordingly, a non-U.S. entity that does not prepare its financial statements in accordance with U.S. GAAP is required to meet financial requirements between 1½ to 7 times the minimum financial requirements that would otherwise be applicable to the non-U.S entity. Given that, as noted above, the financial responsibility requirements generally require a Participant to have a certain level of capital, Section 2 of the Policy Statement has the effect of requiring a non-U.S. entity that does not prepare its financial statements in accordance with U.S. GAAP to have capital between 1½ to 7 times the otherwise-applicable capital requirement.

Section 2 of the Policy Statement also provides that a non-U.S. entity must be in compliance with the financial

[10] *See* The Options Clearing Corporation, OCC Rules, Rule 301(a), *available at https://www.theocc.com/Company-Information/Documents-and-Archives/By-Laws-and-Rules* (requiring broker-dealers to have initial net capital of not less than $2,500,000); Chicago Mercantile Exchange Inc., CME Rulebook, Rule 970.A.1, *available at https://www.cmegroup.com/rulebook/CME/I/9/9.pdf* (requiring clearing members to maintain capital of at least $5 million, with banks required to maintain minimum tier 1 capital of at least $5 billion); LCH SA, LCH SA Clearing Rule Book, Section 2.3.2, *available at https://www.lch.com/resources/rulebooks/lch-sa* (requiring, with respect to securities clearing, capital of at least EUR 10 million for self-clearing members and at least EUR 25 million for members clearing for others, subject to partial satisfaction by a letter of credit) (1 EUR = $0.8150 as of December 31, 2020; *see https://www.fiscal.treasury.gov/reports-statements/treasury-reporting-rates-exchange/current.html* (last visited January 14, 2021)).

Although the requirements of these FMIs are greater than what DTC proposes, DTC is choosing not to raise the requirement further given that it employs a fully collateralized model, which mitigates the level of risk that its Participants pose to DTC.

[11] *See* Policy Statement, *supra* note 3.

reporting and responsibility standards of its home country regulator.

(iii) Current DTC Watch List and Enhanced Surveillance List

DTC's Watch List is a list of Participants that are deemed by DTC to pose a heightened risk to it and its Participants based on credit ratings and other factors.[12]

Specifically, the Watch List is the list of Participants with credit ratings derived from DTC's Credit Risk Rating Matrix (''CRRM'')[13] of 5, 6 or 7, as well as Participants that, based on DTC's consideration of relevant factors, including those set forth in Section 10 of Rule 2 (Participants and Pledgees),[14] are deemed by DTC to pose a heightened risk to it and its Participants.

In addition to the Watch List, DTC also maintains a separate list of Participants subject to enhanced surveillance in accordance with the provisions of Section 10(b) of Rule 2, as discussed below. The enhanced surveillance list is a list of Participants for which DTC has heightened credit concerns, which may include Participants that are already, or may soon be, on the Watch List. As described below, a Participant is subject to the same potential consequences from being subject to enhanced surveillance or being placed on the Watch List.

Rule 2 (Participants and Pledgees)

Rule 2 (Participants and Pledgees) specifies the ongoing participation requirements and monitoring applicable to Participants and Pledgees.[15]

Section 10(b) of Rule 2 provides that a Participant that is (1) a U.S. bank or trust company that files the Consolidated Report of Condition and Income (''Call Report''), (2) a registered broker-dealer that files the Financial and Operational Combined Uniform Single Report (''FOCUS Report'') or the equivalent with its regulator, or (3) a non-U.S. bank or trust company that has audited financial data that is publicly available, will be assigned a credit rating by DTC in accordance with the CRRM. A Participant's credit rating is reassessed each time the Participant provides DTC with requested information pursuant to Section 1 of Rule 2 or as may be otherwise required under the Rules.

Section 10(b) further provides that because the factors used as part of the CRRM may not identify all risks that a Participant assigned a credit rating by DTC may present to DTC, DTC may, in its discretion, override such Participant's credit rating derived from the CRRM to downgrade the Participant. This downgrading may result in the Participant being placed on the Watch List and/or it may subject the Participant to enhanced surveillance based on relevant factors.

Section 10(c) of Rule 2 provides that Participants not assigned a credit rating by DTC will not be assigned a credit rating by the CRRM but may be placed on the Watch List and/or may be subject to enhanced surveillance based on relevant factors.

Section 10(d) of Rule 2 provides that the factors to be considered by DTC in determining whether a Participant is placed on the Watch List and/or subject to enhanced surveillance include (i) news reports and/or regulatory observations that raise reasonable concerns relating to the Participant, (ii) reasonable concerns around the Participant's liquidity arrangements, (iii) material changes to the Participant's organizational structure, (iv) reasonable concerns about the Participant's financial stability due to particular facts and circumstances, such as material litigation or other legal and/or regulatory risks, (v) failure of the Participant to demonstrate satisfactory financial condition or operational capability or if DTC has a reasonable concern regarding the Participant's ability to maintain applicable participation standards, and (vi) failure of the Participant to provide information required by DTC to assess risk exposure posed by the Participant's activity.

Section 10(e) of Rule 2 provides that a Participant being subject to enhanced surveillance or being placed on the Watch List (1) will result in a more thorough monitoring of the Participant's financial condition and/or operational capability, including on-site visits or additional due diligence information requests, and (2) may be required make more frequent financial disclosures to DTC. Participants that are subject to enhanced surveillance are also reported to DTC's management committees and regularly reviewed by DTC senior management.

(iv) Proposed Rule Changes

A. Changes To Enhance DTC's Capital Requirements

As noted earlier, as a CSD, DTC is exposed to the credit risks of its Participants. The credit risks borne by DTC are mitigated, in part, by the capital maintained by Participants, which serves as a loss-absorbing buffer.

DTC's financial responsibility standards for Participants generally require Participants to have and maintain certain levels of capital.

As described in more detail below, DTC proposes to enhance its capital requirements for Participants as follows:

Rule 1 (Definitions; Governing Law)

In connection with its proposal to enhance capital requirements for Participants, DTC proposes to add to Rule 1 new defined terms of ''CET1 Capital,'' ''Excess Net Capital,'' ''Tier 1 RBC Ratio'' and ''Well Capitalized,'' as discussed below.

Policy Statement, Section 1 (Policy Statement on the Admission of U.S. Entities as Participants)

U.S. Banks and Trust Companies That Are Banks

DTC proposes to (1) change the measure of capital requirements for U.S. banks and trust companies that are banks from equity capital to common equity tier 1 capital (''CET1 Capital''),[16] (2) raise the minimum capital requirements for U.S. banks and trust companies that are banks, and (3) require U.S. banks and trust companies that are banks to be well capitalized (''Well Capitalized'') as defined in the capital adequacy rules and regulations of the Federal Deposit Insurance Corporation (''FDIC'').[17]

DTC proposes to change the measure of capital requirements for U.S. banks and trust companies that are banks from equity capital to CET1 Capital and raise the minimum capital requirements for U.S. banks and trust companies that are banks in order to align DTC's capital requirements with banking regulators' changes to regulatory capital requirements over the past several years, which have standardized and harmonized the calculation and measurement of bank capital and leverage throughout the world.[18]

[12] *See* Rule 1 (Definitions; Governing Law), *supra* note 3.

[13] DTC's CRRM is a matrix of credit ratings of Participants specified in Section 10(a) of Rule 2. The CRRM is developed by DTC to evaluate the credit risk Participants pose to DTC and its Participants and is based on factors determined to be relevant by DTC from time to time, which factors are designed to collectively reflect the financial and operational condition of a Participant. These factors include (i) quantitative factors, such as capital, assets, earnings, and liquidity, and (ii) qualitative factors, such as management quality, market position/environment, and capital and liquidity risk management. *See* Rule 1 (Definitions; Governing Law), *supra* note 3.

[14] Rule 2 (Participants and Pledgees), Section 10, *supra* note 3.

[15] Rule 2 (Participants and Pledgees), *supra* note 3.

[16] Under the proposal, CET1 Capital would be defined as an entity's common equity tier 1 capital, calculated in accordance with such entity's regulatory and/or statutory requirements.

[17] *See* 12 CFR 324.403(b)(1).

[18] *Compare, e.g.,* 12 CFR 324.20(b) (FDIC's definition of CET1 Capital), and Regulation (EU) No

Consistent with these changes by banking regulators, DTC believes that the appropriate capital measure for Participants that are U.S. banks and trust companies that are banks should be CET1 Capital and that DTC's capital requirements for Participants should be enhanced in light of these increased regulatory capital requirements.

In addition, requiring U.S. banks and trust companies that are banks to be Well Capitalized ensures that Participants are well capitalized while also allowing adjusted capital to be relative to either the risk-weighted assets or average total assets of the bank or trust company. DTC proposes to have the definition of Well Capitalized expressly tied to the FDIC's definition of ''well capitalized'' to ensure that the proposed requirement that U.S. banks and trust companies that are banks be Well Capitalized will keep pace with future changes to banking regulators' regulatory capital requirements.

Under the proposal, an applicant or Participant that is a U.S. bank or a U.S. trust company that is a bank must have and maintain at all times at least $15 million in CET1 Capital and be Well Capitalized at all times.

U.S. Banks Trust Companies That Are Not Banks

DTC does not propose to change the existing capital requirements applicable to an applicant or Participant that is a U.S. trust company that is not a bank, although DTC is proposing to make some clarifying and conforming language changes to improve the accessibility and transparency of these capital requirements, without substantive effect.

DTC treats U.S. trust companies that are banks and non-banks differently because they present different risks based on the attendant risks of their business activities, with trust companies engaging in banking activities (*e.g.,* receiving deposits and making loans) being subject to greater risks than trust companies that limit their activities to trust activities (*e.g.,* acting as a trustee, other fiduciary or transfer agent/registrar).

U.S. Broker-Dealers

DTC proposes to increase the minimum excess net capital (''Excess Net Capital'')[19] requirements for applicants or Participants that are U.S. broker-dealers to $1 million. This would double the current Excess Net Capital requirements applicable to Participants that are U.S. broker-dealers.

As described in more detail below, the proposed minimum Excess Net Capital increase will help ensure DTC's ongoing compliance with regulatory requirements and expectations related to credit risk, such as those addressed in CCAS Rules 17Ad–22(e)(4)(i) and (e)(18).[20]

U.S. CSDs

DTC proposes to require that an applicant or Participant that is a U.S. CSD have and maintain at all times at least $5 million in equity capital. DTC proposes that any clearing corporation would be deemed to be a CSD for the purposes of determining such applicant or Participant's minimum financial requirements. DTC proposes to create a standard capital requirement for Participants that are U.S. CSDs due to the systemic importance of these Participants and the need to hold these Participants to a consistent, high standard to ensure that they have sufficient capital to fulfill their systemically important role.

U.S. Securities Exchanges

DTC proposes to require that an applicant or Participant that is a national securities exchange registered under the Exchange Act must have and maintain at all times at least $100 million in equity capital. DTC proposes to create a standard capital requirement for Participants that are national securities exchanges due to the systemic importance of these Participants and the need to hold these Participants to a consistent, high standard to ensure that they have sufficient capital to fulfill their systemically important role.

U.S. Settling Banks

DTC proposes to require that a Settling Bank or applicant to be a Settling Bank that, in accordance with such entity's regulatory and/or statutory requirements, calculates a Tier 1 RBC Ratio must have a Tier 1 RBC Ratio[21] at all times equal to or greater than the Tier 1 RBC Ratio that would be required for such Settling Bank or applicant to be Well Capitalized.

Other U.S. Entities

For any other U.S. entity applicant or Participant that is not otherwise addressed above, (1) such applicant or Participant must maintain compliance with its regulator's minimum financial requirements at all times and (2) DTC may, based on information provided by or concerning an applicant or Participant, also assign minimum financial requirements to such applicant or Participant based on how closely it resembles another Participant type and its risk profile. Any such assigned minimum financial requirements would be promptly communicated to, and discussed with, the applicant or Participant.

At the end of Section 1 of the Policy Statement, DTC proposes to make explicit that, notwithstanding anything to the contrary in such section, an applicant or Participant must maintain compliance with its regulator's minimum financial requirements at all times.

Policy Statement, Section 2 (Policy Statement on the Admission of Non-U.S. Entities as Participants)

Non-U.S. Banks and Trust Companies

DTC proposes to require a Participant that is a non-U.S. bank or trust company (including a U.S. branch or agency) to (1) have and maintain at all times at least $15 million in CET1 Capital and comply at all times with the minimum capital requirements (including, but not limited to, any capital conservation buffer, countercyclical buffer, and any Domestic Systemically Important Banks (''D–SIB'') or Global Systemically Important Bank (''G–SIB'') buffer, if applicable) and capital ratios required by its home country regulator, or, if greater, with such minimum capital requirements or capital ratios standards promulgated by the Basel Committee on Banking Supervision,[22] (2) provide an attestation for itself, its parent bank and its parent bank holding company (as applicable) detailing the minimum capital requirements (including, but not limited to, any capital conservation buffer, countercyclical buffer, and any D–SIB or G–SIB buffer, if applicable) and capital ratios required by their home country regulator, (3) provide, no less than annually and upon request by DTC, an attestation for the Participant, its parent bank and its parent bank holding company (as applicable) detailing the minimum capital

575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, Article 26, *available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R0575* (European Union's definition of CET1 Capital), with Basel Committee on Banking Supervision, Basel III Standards, CAP10.6, *supra* note 5 (Basel III Standards' definition of CET1 Capital).

[19] Under the proposal, Excess Net Capital would be defined as a broker-dealer's excess net capital, calculated in accordance with such broker-dealer's regulatory and/or statutory requirements.

[20] 17 CFR 240.17Ad-22(e)(4)(i) and (e)(18).

[21] Under the proposal, Tier 1 RBC Ratio would be defined as the ratio of an entity's tier 1 capital to its total risk-weighted assets, calculated in accordance with such entity's regulatory and/or statutory requirements.

[22] *See* Basel Committee on Banking Supervision, Basel III Standards, *supra* note 5.

requirements (including, but not limited to, any capital conservation buffer, countercyclical buffer, and any D–SIB or G–SIB buffer, if applicable) and capital ratios required by their home country regulator and (4) notify DTC: (a) within two Business Days of any of their capital requirements (including, but not limited to, any capital conservation buffer, countercyclical buffer, and any D–SIB or G–SIB buffer, if applicable) or capital ratios falling below any minimum required by their home country regulator; and (b) within 15 calendar days of any such minimum capital requirement or capital ratio changing.

As described above, pursuant to Section 2 of the Policy Statement, the current minimum capital requirements for a Participant that does not prepare its financial statements in accordance with U.S. GAAP is subject to a multiplier that requires such Participant to have capital between 1½ to 7 times the otherwise-applicable capital requirement.

The multiplier was designed to account for the less transparent nature of accounting standards other than U.S. GAAP. However, accounting standards have converged over the years (namely IFRS and U.S. GAAP).[23] As such, DTC believes the multiplier is no longer necessary and its retirement would be a welcomed simplification for both DTC and its Participants.

Accordingly, DTC proposes to delete the language in Section 2 of the Policy Statement providing that the minimum capital requirements for a Participant that does not prepare its financial statements in accordance with U.S. GAAP is subject to a multiplier that requires such Participants to have capital between 1½ to 7 times the otherwise-applicable capital requirement.

As described above, DTC also proposes that non-U.S. banks be compliant with the minimum capital requirements and capital ratios in their home jurisdiction. Given the difficulty in knowing and monitoring compliance with various regulatory minimums for various jurisdictions, these Participants would be required to provide DTC with periodic attestations relating to the minimum capital requirements and capital ratios for their home jurisdiction.

Non-U.S. Broker-Dealers

DTC proposes to impose a minimum capital requirement of $25 million in total equity capital for applicants or Participants that are non-U.S. broker-dealers.

Non-U.S. CSDs

DTC proposes to require that an applicant or Participant that is a non-U.S. CSD have and maintain at all times at least $5 million in equity capital. DTC proposes that any non-U.S. entity clearing corporation would be deemed to be a CSD for the purposes of determining such applicant or Participant's minimum financial requirements. DTC proposes to create a standard capital requirement for Participants that are non-U.S. CSDs due to the systemic importance of these Participants and the need to hold these Participants to a consistent, high standard to ensure that they have sufficient capital to fulfill their systemically important role.

Non-U.S. Securities Exchanges

DTC proposes requiring that an applicant or Participant that is a non-U.S. securities exchange or multilateral trading facility must have and maintain at all times at least $100 million in equity capital. DTC proposes to create a standard capital requirement for Participants that are non-U.S. securities exchanges due to the systemic importance of these Participants and the need to hold these Participants to a consistent, high standard to ensure that they have sufficient capital to fulfill their systemically important role.

Other Non-U.S. Entities

For any other non-U.S. entity applicant or Participant that is not otherwise addressed above, (1) such applicant or Participant must maintain compliance with its home country regulator's minimum financial requirements at all times and (2) DTC may, based on information provided by or concerning an applicant or Participant, also assign minimum financial requirements to such applicant or Participant based on how closely it resembles another Participant type and its risk profile. Any such assigned minimum financial requirements would be promptly communicated to, and discussed with, the applicant or Participant.

At the end of Section 2 of the Policy Statement, DTC proposes to make explicit that, notwithstanding anything to the contrary in such section, an applicant or Participant must maintain compliance with its home country regulator's minimum financial requirements at all times.

Other Proposed Changes to the Policy Statement

Introduction and General Changes

DTC proposes, without substantive effect, to improve the readability and accessibility of the Policy Statement by (i) adding appropriate headings and sub-headings and renumbering sections as appropriate, (ii) deleting undefined terms and replacing them with appropriate defined terms, including replacing references to ''foreign entities'' with references to ''non-U.S. entities'' and (iii) fixing typographical and other errors, in each case throughout the Policy Statement.

Section 1

In Section 1 of the Policy Statement, DTC proposes to make explicit that following a U.S. entity applicant's admission as a Participant, it will be required to remain in good standing as a Participant, meeting the required qualifications, financial responsibility, operational capability and character described in the Policy Statement and in the Rules.

DTC proposes to move under the newly added heading of ''Qualifications'' in Section 1.A of the Policy Statement the existing language providing that in the event an organization that is not subject to regulatory oversight desires to become a Participant, DTC may review with such organization the economic and operational implications of direct participation in DTC as well as how its participation could be structured to comply with the Policy Statement.

Section 2

DTC proposes to provide in Section 2 of the Policy Statement that a non-U.S. entity applicant that satisfies the

[23] The convergence between IFRS and U.S. GAAP began with the 2002 Norwalk Agreement. (*Available at https://www.ifrs.org/content/dam/ifrs/around-the-world/mous/norwalk-agreement-2002.pdf.*) Under that agreement, the Financial Accounting Standards Board (''FASB'') and the International Accounting Standards Board (''IASB'') signed a memorandum of understanding on the convergence of accounting standards. Between 2010 and 2013, FASB and IASB published several quarterly progress reports on their work to improve and achieve convergence of U.S. GAAP and IFRS. In 2013, the International Financial Reporting Standards Foundation established the Accounting Standards Advisory Forum (''ASAF'') to improve cooperation among worldwide standard setters and advise the IASB as it developed IFRS. (*See https://www.ifrs.org/groups/accounting-standards-advisory-forum/.*) FASB was selected as one of the ASAF's twelve members. FASB's membership on the ASAF helps represent U.S. interests in the IASB's standard-setting process and continues the process of improving and converging U.S. GAAP and IFRS. In February 2013, the Journal of Accountancy published its view of the success of the convergence project citing converged or partially converged standards, including business combinations, discontinued operations, fair value measurement, and share-base payments. (*Available at https://www.journalofaccountancy.com/issues/2013/feb/20126984.html.*) Subsequent to the publication, IASB and FASB converge on revenue recognition. While IASB and FASB have not achieved full convergence, DTC believes the accounting rules are sufficiently aligned such that the multiplier is no longer required.

qualifications for eligibility to become a Participant set forth under Section 1 of Rule 3 must comply with minimum financial resource requirements in order to qualify for admission. DTC proposes to make explicit in Section 2 of the Policy Statement that following a non-U.S. entity applicant's admission as a Participant, it will be required to remain in good standing as a Participant, meeting the required qualifications, financial responsibility, operational capability and character described in the Policy Statement and in the Rules.

B. Changes to DTC's Watch List and Enhanced Surveillance List

DTC proposes to redefine the Watch List and eliminate the separate enhanced surveillance list and instead implement a new Watch List that consists of a relatively smaller group of Participants that pose heightened risk to DTC and its Participants.

DTC believes that the current system of having both a Watch List and an enhanced surveillance list has confused various DTC stakeholders, while the proposed approach, as DTC understands from its experience, will be more consistent with industry practices and understanding of a ''Watch List.''

The new Watch List would include Participants with a CRRM rating of 6 or 7, as well as Participants that are deemed by DTC to pose a heightened risk to it and its Participants. The separate enhanced surveillance list would be merged into the new Watch List, and references to the separate enhanced surveillance list would be deleted from the Rules.

In sum, the new Watch List would consist of Participants on the existing enhanced surveillance list, Participants with a CRRM rating of 6 or 7, and any other Participants that are deemed by DTC to pose a heightened risk to it and its Participants.

The proposed change will mean that Participants with a CRRM rating of 5 would no longer automatically be included on the Watch List. Participants with a CRRM rating of 5 represent the largest single CRRM rating category, but DTC does not believe all such Participants present heightened credit concerns.[24] Nevertheless, DTC would continue to have the authority to place a Participant on the new Watch List if it is deemed to pose a heightened risk to DTC and its Participants and/or to downgrade the CRRM rating of a Participant.

DTC also proposes to clarify in Section 10(e) of Rule 2 that Participants on the Watch List are reported to DTC's management committees and regularly reviewed by DTC's senior management.

Participant Outreach

Beginning in June 2019, DTC conducted outreach to various Participants in order to provide them with advance notice of the proposed enhancements to DTC's capital requirements, the proposed redefinition of the Watch List, and the proposed elimination of the enhanced surveillance list. DTC has been in communication with all Participants whose current capital levels are either below the proposed minimum capital requirements or only slightly above the proposed requirements. Any such Participants have been informed of the new requirement that would be in effect 12 months after approval of the proposed changes. Following approval, DTC again would contact any Participants that are either below or only slightly above the new minimum requirement to remind them of their new capital requirement and the 12-month grace period in which to come into compliance with the new requirement.

DTC has not conducted outreach to Participants providing them with advance notice of the proposed clarification changes to the Rules.

DTC has not received any written comments from Participants on the proposal.[25] The Commission will be notified of any written comments received.

Implementation Timeframe

Pending Commission approval, DTC would implement the proposed changes to enhance its capital requirements for Participants one year after the Commission's approval of this proposed rule change. During that one-year period, DTC would periodically provide Participants with estimates of their capital requirements, based on the approved changes, with more outreach expected for Participants impacted by the changes. The deferred implementation for all Participants and the estimated capital requirements for Participants are designed to give Participants the opportunity to assess the impact of their enhanced capital requirements on their business profile. All Participants would be advised of the implementation date of these proposed changes through issuance of a DTC Important Notice, posted to its website. DTC also would inform firms applying for participation of the new capital requirements. Participants and applicants should note that the methodology/processes used to set their initial capital requirements would be the same at implementation of the proposed changes as it would be on an ongoing basis.

DTC expects to implement the proposed changes to redefine the Watch List and eliminate the enhanced surveillance list within 90 days of Commission approval. All Participants would be advised of such implementation through issuance of a DTC Important Notice, posted to its website.

2. Statutory Basis

DTC believes that the proposed rule change is consistent with the requirements of the Exchange Act, and the rules and regulations thereunder applicable to a registered clearing agency. Specifically, DTC believes that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Exchange Act[26] and Rules 17Ad–22(e)(4)(i) and (e)(18),[27] each as promulgated under the Exchange Act, for the reasons described below.

Section 17A(b)(3)(F) of the Exchange Act requires, in part, that the Rules be designed to promote the prompt and accurate clearance and settlement of securities transactions.[28] As described above, the proposed rule changes would (1) enhance DTC's capital requirements for Participants (2) redefine the Watch List and eliminate the enhanced surveillance list, and (3) make clarification changes to the Rules. DTC believes that enhancing its capital requirements for Participants, including continuing to recognize and account for varying Participants and participation categories, would help ensure that Participants maintain sufficient capital to absorb losses arising out of their clearance and settlement activities at DTC and otherwise, and would help DTC more effectively manage and mitigate the credit risks posed by its Participants, which would in turn help DTC be better able to withstand such

[24] The majority of Participants with a CRRM rating of 5 are either rated ''investment grade'' by external rating agencies or, in the absence of external ratings, DTC believes are equivalent to investment grade, as many of these Participants are primary dealers and large foreign banks. A firm with a rating of ''investment grade'' is understood to be better able to make its payment obligations compared to a firm with a lesser rating, such as a rating of ''speculative.'' As such, among the total population, firms with investment grade ratings are generally considered good credit risk along a credit risk scale.

[25] DTC did receive written comments in relation to a proposal by one of its affiliated clearing agencies (National Securities Clearing Corporation) to enhance its own capital requirements; however, those comments do not relate to this proposal and are therefore not addressed in this rule filing.

[26] 15 U.S.C. 78q–1(b)(3)(F).

[27] 17 CFR 240.17Ad–22(e)(4)(i) and (e)(18).

[28] 15 U.S.C. 78q–1(b)(3)(F).

credit risks and continue to meet its clearance and settlement obligations to its Participants. Similarly, DTC believes that redefining the Watch List and eliminating the enhanced surveillance list, as described above, would help DTC better allocate its resources for monitoring the credit risks posed by its Participants, which would in turn help DTC more effectively manage and mitigate such credit risks so that DTC is better able to withstand such credit risks and continue to meet its clearance and settlement obligations to its Participants. DTC believes that making clarification changes to the Rules, including through the use of new defined terms, would help ensure that the Rules remain clear and accurate, which would in turn help facilitate Participants' understanding of the Rules and provide Participants with increased predictability and certainty regarding their rights and obligations with respect to DTC's clearance and settlement activities. Therefore, DTC believes that these proposed rule changes would promote the prompt and accurate clearance and settlement of securities transactions, consistent with Section 17A(b)(3)(F) of the Exchange Act.

Rule 17Ad–22(e)(4)(i) under the Exchange Act requires that DTC establish, implement, maintain and enforce written policies and procedures reasonably designed to effectively identify, measure, monitor, and manage its credit exposures to participants and those arising from its payment, clearing, and settlement processes, including by maintaining sufficient financial resources to cover its credit exposure to each participant fully with a high degree of confidence.[29] As described above, DTC proposes to enhance its capital requirements for Participants, redefine the Watch List, and eliminate the enhanced surveillance list. DTC believes that enhancing its capital requirements for Participants (including through the use of new defined terms), would help ensure that Participants maintain sufficient capital to absorb losses arising out of their clearance and settlement activities at DTC and otherwise, which would in turn help DTC more effectively manage and mitigate its credit exposures to its Participants and thereby help enhance the ability of DTC's financial resources to cover fully DTC's credit exposures to Participants with a high degree of confidence. DTC believes that redefining the Watch List and eliminating the enhanced surveillance list would help DTC better allocate its resources for monitoring its credit exposures to Participants. By helping to better allocate resources, the proposal would in turn help DTC more effectively manage and mitigate its credit exposures to its Participants, thereby helping to enhance the ability of DTC's financial resources to cover fully DTC's credit exposures to Participants with a high degree of confidence. Therefore, DTC believes that its proposal to enhance its capital requirements for Participants, redefine the Watch List, and eliminate the enhanced surveillance list is consistent with Rule 17Ad–22(e)(4)(i) under the Exchange Act.

Rule 17Ad–22(e)(18) under the Exchange Act requires that DTC establish, implement, maintain and enforce written policies and procedures reasonably designed to establish objective, risk-based, and publicly disclosed criteria for participation, which permit fair and open access by direct and, where relevant, indirect participants and other financial market utilities, require participants to have sufficient financial resources and robust operational capacity to meet obligations arising from participation in the clearing agency, and monitor compliance with such participation requirements on an ongoing basis.[30] As described above, DTC proposes to (1) enhance its capital requirements for Participants, (2) redefine the Watch List and eliminate the enhanced surveillance list, and (3) make clarification changes to the Rules, including through the use of new defined terms. DTC's proposed capital requirements would utilize objective measurements of Participant capital that would be fully disclosed in the Rules. The proposed capital requirements also would be risk-based and allow for fair and open access in that they would be based on the credit risks imposed by the Participant, such as its type of entity (including whether it is a non-U.S. entity). Accordingly, DTC's proposed capital requirements would establish objective, risk-based and publicly disclosed criteria for participation, which would permit fair and open access by Participants. The proposed capital requirements also would ensure that Participants maintain sufficient capital to absorb losses arising out of their clearance and settlement activities at DTC and otherwise, which would help ensure that they have sufficient financial resources to meet the obligations arising from their participation at DTC. DTC's proposed redefinition of the Watch List and the elimination of the enhanced surveillance list would help DTC better allocate its resources for monitoring the credit risks posed by its Participants, including their ongoing compliance with DTC's proposed enhancements to its capital requirements. DTC's proposed clarification changes to the Rules, including new defined terms, would help ensure that the proposed changes to the capital requirements, Watch List, and enhanced surveillance list are clear and accurate, which would in turn help facilitate Participants' understanding of DTC's participation requirements and information related to participation. Therefore, DTC believes that its proposal to enhance its capital requirements for Participants, redefine the Watch List, and eliminate the enhanced surveillance list is consistent with Rule 17Ad–22(e)(18) under the Exchange Act.

(B) Clearing Agency's Statement on Burden on Competition

DTC does not believe the proposed changes to enhance the capital requirements for its Participants will have an impact on competition because Participants largely already meet, and in most cases exceed, the proposed capital requirements. Nevertheless, DTC fully appreciates that for the few Participants that do not already meet the proposed requirements, the proposed rule change could have an impact upon competition because those Participants could be required to maintain capital in excess of their current capital levels. That impact could impose a burden on competition on some of those Participants because they may bear higher costs to raise capital in order to comply with the enhanced capital requirements. However, DTC does not believe the burden on competition would be significant because, again, only a few Participants do not already meet the proposed requirements. In any event, to the extent there would be a burden on competition, DTC believes it would be necessary and appropriate in furtherance of the purposes of the Exchange Act, as permitted by Section 17A(b)(3)(I) thereunder.[31]

DTC believes the enhanced capital requirements are necessary because, in short, the current requirements are outdated. As noted above, the current minimum capital requirements for Participants have not been adjusted in over 20 years. Meanwhile, there have been significant changes to the industry (*e.g.,* market structure, technology, and regulatory environment) within which DTC and all its Participants operate, exposing DTC and its Participants to more and different risks than 20 years ago.

[29] 17 CFR 240.17Ad–22(e)(4)(i).

[30] 17 CFR 240.17Ad–22(e)(18).

[31] 15 U.S.C. 78q–1(b)(3)(I).

There also have been significant Participant changes over the past 20 years. Numerous mergers, acquisitions, and new market entrants have created a diverse group of Participants that has expanded the credit-risk profiles that DTC must manage.

Moreover, as noted above, transaction values at DTC have increased significantly over the years.[32] Although the increase does not present more risk to DTC directly, as DTC's services are nonguaranteed and fully collateralized, DTC does have an interest in ensuring that its Participants have a certain minimum amount of capital to help support the increased activity.

There also has been heightened focus on legal, operational, and cyber risk, given the devastating impact that they could have today. Appreciation of these greater risks have manifested into new regulatory requirements for certain industry participants,[33] including DTC, requiring DTC to maintain greater capital amounts and deploy enhanced risk management tools.[34]

While DTC believes Participants must understand the risks that their capitalization presents to DTC and be prepared to monitor their capitalization and alter their behavior in order to minimize that risk, as necessary, DTC also appreciates and understands that Participants must be able to plan for their capital requirements. That is why DTC would not implement the proposed changes to any of the enhanced capital requirements until one year after the Commission's approval of the proposal. During that one-year period, DTC would periodically provide Participants with estimates of their capital requirements. The deferred implementation for all Participants and the estimated capital requirements for Participants are designed to give Participants the opportunity to assess the impact of their enhanced capital requirements on their business profile and make any changes that they deem necessary.

DTC also believes the proposed changes are consistent with and would improve upon DTC's compliance with applicable regulatory requirements, as discussed above, including Section 17A(b)(3)(F) of the Exchange Act and Rules 17Ad–22(e)(4)(i) and (e)(18) promulgated thereunder.

Therefore, DTC believes the proposed changes to enhance the capital requirements for its Participants are appropriate in furtherance of the purposes of the Exchange Act, as permitted by Section 17A(b)(3)(I) thereunder,[35] as the proposed changes are purposely tailored and structured, provide for a one-year implementation period, and are consistent with applicable provisions of the Exchange Act and rules thereunder.

DTC does not believe that the proposed changes to redefine the Watch List and eliminate the enhanced surveillance list would impact competition. Redefining the Watch List and eliminating the enhanced surveillance list are simply intended to streamline and clarify these monitoring practices. If anything, by no longer automatically including Participants with a CRRM rating of 5 on the Watch List, as proposed, the change could promote competition for such Participants, as such Participants would no longer automatically be subject to increased scrutiny by DTC, including the possibility of increased financial and reporting obligations.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

DTC has not received or solicited any written comments relating to this proposal.[36] If any written comments are received, DTC will amend this filing to publicly file such comments as an Exhibit 2 to this filing, as required by Form 19b–4 and the General Instructions thereto.

Persons submitting written comments are cautioned that, according to Section IV (Solicitation of Comments) of the Exhibit 1A in the General Instructions to Form 19b–4, the Commission does not edit personal identifying information from comment submissions. Commenters should submit only information that they wish to make available publicly, including their name, email address, and any other identifying information.

All prospective commenters should follow the Commission's instructions on *How to Submit Comments,* available at *https://www.sec.gov/regulatory-actions/how-to-submit-comments.* General questions regarding the rule filing process or logistical questions regarding this filing should be directed to the Main Office of the Commission's Division of Trading and Markets at *tradingandmarkets@sec.gov* or 202–551–5777.

DTC reserves the right to not respond to any comments received.

III. Date of Effectiveness of the Proposed Rule Change, and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–DTC–2021–017 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR–DTC–2021–017. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of

[32] *See supra* note 9.

[33] *See, e.g.,* Basel Committee on Banking Supervision, Basel III Standards, *supra* note 5; Financial Stability Board, 2020 list of G–SIBs, *supra* note 6; U.S. Department of the Treasury, Designations, Financial Market Utility Designations, *supra* note 7.

[34] *See, e.g.,* CCAS, *supra* note 8.

[35] 15 U.S.C. 78q–1(b)(3)(I).

[36] *See supra* note 25.

10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of DTC and on DTCC's website (*http://dtcc.com/legal/sec-rule-filings.aspx*). All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–DTC–2021–017 and should be submitted on or before January 19, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[37]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–28249 Filed 12–28–21; 8:45 am]

BILLING CODE 8011–01–P

[37] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93857; File No. SR–FICC–2021–009]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing of Proposed Rule Change To Enhance Capital Requirements and Make Other Changes

December 22, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 13, 2021, Fixed Income Clearing Corporation (''FICC'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the clearing agency. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change consists of amendments to the Government Securities Division (''GSD'') Rulebook (the ''GSD Rules'') and the Mortgage-Backed Securities Division (''MBSD'') Clearing Rules (the ''MBSD Rules,'' and together with the GSD Rules, the ''Rules'') of FICC in order to (i) enhance FICC's capital requirements for Members of GSD and Members of MBSD (collectively, ''members''), (ii) redefine FICC's Watch List and eliminate FICC's enhanced surveillance list, and (iii) make certain other clarifying, technical and supplementary changes in the Rules, including definitional updates, to accomplish items (i) and (ii), as described in greater detail below.[3]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the clearing agency included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The clearing agency has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to (i) enhance FICC's capital requirements for Members of GSD and Members of MBSD (collectively, ''members''), (ii) redefine FICC's Watch List and eliminate FICC's enhanced surveillance list, and (iii) make certain other clarifying, technical and supplementary changes in the Rules, including definitional updates, to accomplish items (i) and (ii).

(i) Background

Central counterparties (''CCPs'') play a key role in financial markets by mitigating counterparty credit risk on transactions of their participants. CCPs achieve this by providing guaranties to participants and, as a consequence, are typically exposed to credit risks that could lead to default losses.

As a CCP, FICC is exposed to the credit risks of its members. The credit risks borne by FICC are mitigated, in part, by the capital maintained by members, which serves as a loss-absorbing buffer.

In accordance with Section 17A(b)(4)(B) of the Exchange Act,[4] a registered clearing agency such as FICC may, among other things, deny participation to, or condition the participation of, any person on such person meeting such standards of financial responsibility prescribed by the rules of the registered clearing agency.

In furtherance of this authority, FICC requires applicants and members to meet the relevant financial responsibility standards prescribed by the Rules. These financial responsibility standards generally require members to have and maintain certain levels of capital, as more particularly described in the Rules and below.

FICC's capital requirements for its members have not been updated in nearly 20 years.[5] Since that time, there have been significant changes to the financial markets that warrant FICC revisiting its capital requirements. For example, the regulatory environment within which FICC and its members operate has undergone various changes. The implementation of the Basel III standards,[6] the designation of many banks as systemically important by the Financial Stability Board,[7] as well as the designation of FICC as a systemically important financial market utility (''SIFMU'') by the Financial Stability Oversight Council,[8] have significantly increased the regulatory requirements, including capital requirements, of many financial institutions and CCPs. Similarly, the Covered Clearing Agency Standards (''CCAS'') adopted by the Commission have raised the regulatory standards applicable to CCPs such as FICC.[9]

There also have been significant membership changes over the past 20 years. Numerous mergers, acquisitions, and new market entrants (*e.g.,* via the CCIT and Sponsoring Member programs at FICC) have created a diverse FICC membership that has expanded the credit-risk profiles that FICC must manage. For example, post the 2008 financial crisis and subsequent changes in regulatory capital requirements, FICC

[3] Capitalized terms not defined herein shall have the meanings ascribed to such terms in the GSD Rules and the MBSD Rules, as applicable, *available at https://www.dtcc.com/legal/rules-and-procedures.*

[4] 15 U.S.C. 78q–1(b)(4)(B).

[5] Although FICC has not updated capital requirements for many of its members in nearly 20 years, during that time FICC has adopted new membership categories with corresponding capital requirements that FICC believes are still appropriate. As such, FICC is not proposing changes to capital requirements for all membership categories.

[6] Basel Committee on Banking Supervision, The Basel Framework, *available at https://www.bis.org/basel_framework/index.htm?export=pdf* (''Basel III Standards'').

[7] *See* Financial Stability Board, 2021 list of global systemically important banks, *available at https://www.fsb.org/wp-content/uploads/P231121.pdf.*

[8] *See* U.S. Department of the Treasury, Designations, Financial Market Utility Designations, *available at https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/fsoc/designations.*

[9] 17 CFR 240.17Ad–22(e).

has seen a shift in certain activity away from highly capitalized firms and, instead, to less capitalized, niche market participants.

Moreover, FICC clearing activity and market volatility, each of which present risk to FICC, also increased significantly over the years.[10] Although these factors do not directly require FICC to increase capital requirements for its membership (*e.g.,* there is no specific regulation or formula that prescribes a set capital requirement for members of a CCP such as FICC), the overarching and collective focus of the regulatory changes noted above, in light of the many heightened risks to the financial industry, has been to increase the stability of the financial markets in order to reduce systemic risk. As a self-regulatory organization, a SIFMU, and being exposed to the new and increased risks over the past 20 years, FICC has a responsibility to do the same. Enhancing its capital requirements helps meet that responsibility and improve FICC's credit risk management. Enhanced capital requirements also help mitigate other risks posed directly or indirectly by members such as legal risk, operational risk and cyber risk, as better capitalized members have greater financial resources in order to mitigate the effects of these and other risks.

As for setting the specific capital requirements proposed, again, there is no regulation or formula that requires or calculates a specific amount (*i.e.,* there is no magic number). Instead, FICC considered several factors, including inflation and the capital requirements of other Financial Market Infrastructures, both in the U.S. and abroad, to which the proposed requirements align.[11]

In light of these and other developments described below, FICC proposes to enhance its capital requirements for members, as described in more detail below.

FICC also proposes to redefine the Watch List, which is a list of members that are deemed by FICC to pose a heightened risk to it and its members based on credit ratings and other factors. As part of the redefinition of the Watch List, FICC proposes to eliminate the separate enhanced surveillance list and implement a new Watch List that consists of a relatively smaller group of members that exhibit heightened credit risk, as described in more detail below.

Finally, FICC proposes to make certain other clarification changes in the Rules.

(ii) Current FICC Capital Requirements

The Rules currently specify capital requirements for members based on their membership type and type of entity. The current FICC capital requirements for Members of GSD are set forth in Section 4(b) of GSD Rule 2A (Initial Membership Requirements) [12] for Netting Members, Section 2 of GSD Rule 3A (Sponsoring Members and Sponsored Members) [13] for Sponsoring Members and Section 2(a)(ii) of GSD Rule 3B (Centrally Cleared Institutional Triparty Service) [14] for CCIT Members. The current FICC capital requirements for Clearing Members of MBSD are set forth in Section 2(e) of MBSD Rule 2A (Initial Membership Requirements).[15]

An applicant for a membership type is required to meet the qualifications, financial responsibility, operational capability and business history requirements applicable to the relevant membership type, which may vary based on the applicant's type of entity (*e.g.,* a broker-dealer vs. a bank or trust company). In particular, financial responsibility requirements for a membership type, which generally require the applicant to maintain a certain level of capital, may vary based on an applicant's type of entity and the relevant capital measure for such type of entity.

As relevant to FICC's proposal to enhance its capital requirements for members:

GSD Netting Members

Section 4(b) of GSD Rule 2A requires applicants to become Netting Members to satisfy the following minimum financial requirements:

(A) For applicants whose Financial Statements are prepared in accordance with U.S. generally accepted accounting principles (''U.S. GAAP''):

(1) If the applicant is applying to become a Bank Netting Member, it must have a level of equity capital as of the end of the month prior to the effective date of its membership of at least $100 million, and its capital levels and ratios must meet the applicable minimum levels for such as required by its Appropriate Regulatory Agency (or, if the applicant's Appropriate Regulatory Agency does not specify any such minimum levels, such minimum levels as would be required if the Member were a member bank of the Federal Reserve System and the Member's Appropriate Regulatory Agency were the Board of Governors of the Federal Reserve System);

(2) if the applicant is registered with the SEC pursuant to Section 15 of the Exchange Act and is applying to become a Dealer Netting Member, it must have, as of the end of the calendar month prior to the effective date of its membership, (i) Net Worth of at least $25 million and (ii) Excess Net Capital of at least $10 million;

(3) if the applicant is registered with the SEC pursuant to Section 15C of the Exchange Act and is applying to become a Dealer Netting Member, it must have, as of the end of the calendar month prior to the effective date of its membership, (i) Net Worth of at least $25 million and (ii) Excess Liquid Capital of at least $10 million;

(4) if the applicant is applying to become a Futures Commission Merchant Netting Member, it must have, as of the end of the calendar month prior to the effective date of its membership, $25 million in Net Worth and $10 million in Excess Adjusted Net Capital;

(5) if the applicant is registered with the SEC pursuant to Section 15 of the Exchange Act and is applying to become an Inter-Dealer Broker Netting Member, it must have, as of the end of the calendar month prior to the effective date of its membership, (i) Net Worth of at least $25 million and (ii) Excess Net Capital of at least $10 million;

(6) if the applicant is registered with the SEC pursuant to Section 15C of the Exchange Act and is applying to become an Inter-Dealer Broker Netting Member, it must have, as of the end of the calendar month prior to the effective date of its membership, (i) Net Worth of at least $25 million and (ii) Excess Liquid Capital of at least $10 million;

(7) if the applicant is a Foreign Person that is applying to become a Foreign Netting

[10] *See, e.g.,* DTCC Annual Reports, *available at https://www.dtcc.com/about/annual-report.* FICC is a wholly owned subsidiary of The Depository Trust & Clearing Corporation (''DTCC''). The DTCC Annual Reports highlight and track FICC clearing activity year-over-year. Moreover, interest rates, which are a key risk factor for FICC, experienced a rollercoaster of volatility over the past 14 years, including historic and near-historic peaks in volatility, in response to changing market dynamics (*e.g.,* reduced overall market liquidity, a shift in market liquidity relying on less capitalized market participants, and the advent of electronic trading), the extraordinary monetary policy measures implemented by global central banks, and the multiple financial crises over the past 20 years.

[11] *See* The Options Clearing Corporation, OCC Rules, Rule 301(a), *available at https://www.theocc.com/Company-Information/Documents-and-Archives/By-Laws-and-Rules* (requiring broker-dealers to have initial net capital of not less than $2,500,000); Chicago Mercantile Exchange Inc., CME Rulebook, Rule 970.A.1, *available at https://www.cmegroup.com/rulebook/CME/I/9/9.pdf* (requiring clearing members to maintain capital of at least $5 million, with banks required to maintain minimum tier 1 capital of at least $5 billion); LCH SA, LCH SA Clearing Rule Book, Section 2.3.2, *available at https://www.lch.com/resources/rulebooks/lch-sa* (requiring, with respect to securities clearing, capital of at least EUR 10 million for self-clearing members and at least EUR 25 million for members clearing for others, subject to partial satisfaction by a letter of credit) (1 EUR = $0.8150 as of December 31, 2020; *see https://www.fiscal.treasury.gov/reports-statements/treasury-reporting-rates-exchange/current.html* (last visited January 14, 2021)).

[12] GSD Rule 2A (Initial Membership Requirements), Section 4(b) (Financial Responsibility), *supra* note 3.

[13] GSD Rule 3A (Sponsoring Members and Sponsored Members), Section 2 (Qualifications of Sponsoring Members, the Application Process and Continuance Standards), *supra* note 3.

[14] GSD Rule 3B (Centrally Cleared Institutional Triparty Service), Section 2(a)(ii), *supra* note 3.

[15] MBSD Rule 2A (Initial Membership Requirements), Section 2(e) (Financial Responsibility), *supra* note 3.

Member, it must satisfy the minimum financial requirements (defined by reference to regulatory capital as defined by the applicant's home country regulator) that are applicable to the Netting System membership category that FICC determines, in its sole discretion, would be applicable to the Foreign Person if it were organized or established under the laws of the United States or a State or other political subdivision thereof subject to subsections (B), (C) and (D) below if the entity's financial statements are not prepared in accordance with U.S. GAAP;

(8) if the applicant is applying to become an Insurance Company Netting Member, it must have, as of the end of the month prior to the effective date of its membership: (i) An A.M. Best (''Best'') rating of ''A−'' or better, (ii) a rating by at least one of the other three major rating agencies (Standard & Poor's (''S&P''), Moody's, and Fitch Ratings (''Fitch'')) of at least ''A−'' or ''A3,'' as applicable, (iii) no rating by S&P, Moody's, and Fitch of less than ''A−'' or ''A,'' as applicable, (iv) a risk-based capital ratio, as applicable to Insurance Companies, of at least 200 percent, and (v) statutory capital (consisting of adjusted policyholders' surplus plus the company's asset valuation reserve) of no less than $500 million; and

(9) if the applicant is applying to become a Registered Investment Company Netting Member, it must have minimum Net Assets of $100 million.

(B) For applicants whose Financial Statements are prepared in accordance with International Financial Reporting Standards (''IFRS''), the U.K. Companies Act of 1985 (''U.K. GAAP''), or Canadian generally accepted accounting principles, the minimum financial requirements shall be one and one-half times the applicable requirements set forth in subsection (A) above.

(C) For applicants whose Financial Statements are prepared in accordance with the generally accepted accounting principles of a European Union country other than U.K. GAAP, the minimum financial requirements shall be five times the applicable requirements set forth in subsection (A) above.

(D) For applicants whose financial statements are prepared in accordance with any other type of generally accepted accounting principles, the minimum financial requirements shall be seven times the requirements set forth in subsection (A) above.

Accordingly, a non-U.S. entity that does not prepare its financial statements in accordance with U.S. GAAP is required to meet financial requirements between 1½ to 7 times the minimum financial requirements that would otherwise be applicable to the non-U.S entity. Given that, as noted above, the financial responsibility requirements generally require a member to have a certain level of capital, subsections (B), (C) and (D) of Section 4(b) of GSD Rule 2A have the effect of requiring a non-U.S. entity that does not prepare its financial statements in accordance with U.S. GAAP to have capital between 1½ to 7 times the otherwise-applicable capital requirement.

GSD Sponsoring Members

Section 2(a) of GSD Rule 3A requires a Bank Netting Member applying to become a Category 1 Sponsoring Member to (i) have a level of equity capital as of the end of the month prior to the effective date of its membership of at least $5 billion, (ii) be ''well-capitalized'' as defined by the Federal Deposit Insurance Corporation's applicable regulations, and (iii) if it has a bank holding company that is registered under the Bank Holding Company Act of 1956, as amended, have a bank holding company that is also ''well-capitalized'' as defined by the applicable regulations of the Board of Governors of the Federal Reserve System.

Section 2(b)(ii) of GSD Rule 3A provides that FICC may impose financial requirements on a Netting Member applying to become a Category 2 Sponsoring Member that are greater than financial requirements applicable to the applicant in its capacity as a Netting Member under Section 4(b) of GSD Rule 2A, based upon the level of the anticipated positions and obligations of such applicant, the anticipated risk associated with the volume and types of transactions such applicant proposes to process through FICC as a Category 2 Sponsoring Member, and the overall financial condition of such applicant.

GSD CCIT Members

Section 2(a)(ii) of GSD Rule 3B requires an applicant to become a CCIT Member to satisfy the following minimum financial requirements:

(A) Except as otherwise provided in subsection (B), (C) or (D) below, the applicant must have minimum Net Assets of $100 million. FICC, based upon the level of the anticipated positions and obligations of the applicant, the anticipated risk associated with the volume and types of transactions the applicant proposes to process through FICC and the overall financial condition of the applicant, may impose greater standards.

(B) For applicants whose financial statements are prepared in accordance with IFRS, U.K. GAAP or Canadian generally accepted accounting principles, the minimum financial requirements shall be one and one-half times the applicable requirements set forth in subsection (A) above.

(C) For applicants whose financial statements are prepared in accordance with the generally accepted accounting principles of a European Union country other than U.K. GAAP, the minimum financial requirements shall be five times the applicable requirements set forth in subsection (A) above.

(D) For applicants whose financial statements are prepared in accordance with any other type of generally accepted accounting principles, the minimum financial requirements shall be seven times the applicable requirements set forth in subsection (A) above.

MBSD Clearing Members

Section 2(e) of MBSD Rule 2A requires applicants to become Clearing Members to satisfy the following minimum financial requirements:

(A) For applicants whose Financial Statements are prepared in accordance with U.S. GAAP:

(1) If the applicant is applying to become a Bank Clearing Member, it must have a level of equity capital as of the end of the month prior to the effective date of its membership of at least $100 million, and its capital levels and ratios must meet the applicable minimum levels for such as required by its Appropriate Regulatory Agency (or, if the applicant's Appropriate Regulatory Agency does not specify any such minimum levels, such minimum levels as would be required if the Member were a member bank of the Federal Reserve System and the Member's Appropriate Regulatory Agency were the Board of Governors of the Federal Reserve System);

(2) if the applicant is registered with the SEC pursuant to Section 15 or Section 15C of the Exchange Act and is applying to become a Dealer Clearing Member, it must have, as of the end of the calendar month prior to the effective date of its membership, (i) Net Worth of at least $25 million and (ii) Excess Net Capital of at least $10 million;

(3) if the applicant is registered with the SEC pursuant to Section 15 or Section 15C of the Exchange Act and is applying to become an Inter-Dealer Broker Clearing Member, it must have, as of the end of the calendar month prior to the effective date of its membership, Excess Net Capital of at least $10 million;

(4) if the applicant is applying to become an Unregistered Investment Pool Clearing Member, it must have an investment advisor domiciled in the United States. The Unregistered Investment Pool applicant must have at least $250 million in Net Assets. An Unregistered Investment Pool that does not meet the $250 million Net Asset requirement, but has Net Assets of at least $100 million, shall be eligible for membership if the Unregistered Investment Pool's investment advisor advises an existing Member and has assets under management of at least $1.5 billion. An Unregistered Investment Pool must have an investment advisor registered with the SEC;

(5) if the applicant is applying to become a Government Securities Issuer Clearing Member, it must have at least $100 million in equity capital;

(6) if the applicant is applying to become a Registered Investment Company Clearing Member, it must have minimum Net Assets of $100 million;

(7) if the applicant is applying to become an Insured Credit Union Clearing Member, it

must have a level of equity capital as of the end of the month prior to the effective date of its membership of at least $100 million and achieve the ''well capitalized'' statutory net worth category classification as defined by the NCUA under 12 CFR part 702; and

(8) for all other applicants, they must have sufficient net worth, liquid capital, regulatory capital, or Net Assets, as applicable to the particular type of entity as determined by FICC, and subject to approval of such minimum membership standards by the SEC.

If the applicant in sections (1) through (8) above is a Foreign Person that is applying to become a Foreign Clearing Member, it must satisfy the minimum financial requirements: (i) Defined by reference to regulatory capital as defined by the applicant's home country regulator, or (ii) in the case of unregulated entities, as defined by FICC in its discretion, that are applicable to the Clearing System membership category that FICC determines, in its sole discretion, would be applicable to the Foreign Person if it were organized or established under the laws of the United States or a State or other political subdivision thereof, subject to subsections (B), (C) and (D) below if the entity's financial statements are not prepared in accordance with U.S. GAAP. For Unregistered Investment Pools, subsections (B), (C) and (D) shall apply to the following figures cited in subsection (A)(4) above: the $250 million in Net Assets and the $100 million in Net Assets.

(B) For applicants whose Financial Statements are prepared in accordance with IFRS, U.K. GAAP, or Canadian generally accepted accounting principles, the minimum financial requirements shall be one and one-half times the applicable requirements set forth in subsection (A) above.

(C) For applicants whose Financial Statements are prepared in accordance with the generally accepted accounting principles of a European Union country other than U.K. GAAP, the minimum financial requirements shall be five times the applicable requirements set forth in subsection (A) above.

(D) For applicants whose financial statements are prepared in accordance with any other type of generally accepted accounting principles, the minimum financial requirements shall be seven times the requirements set forth in subsection (A) above.

As was the case for GSD Netting Members, a non-U.S. entity that does not prepare its financial statements in accordance with U.S. GAAP is required to meet financial requirements between 1½ to 7 times the minimum financial requirements that would otherwise be applicable to the non-U.S entity. Given that, as noted above, the financial responsibility requirements generally require a member to have a certain level of capital, subsections (B), (C) and (D) of Section 2(e) of MBSD Rule 2A have the effect of requiring a non-U.S. entity that does not prepare its financial statements in accordance with U.S. GAAP to have capital between 1½ to 7 times the otherwise-applicable capital requirement.

(iii) Current FICC Watch List and Enhanced Surveillance List

FICC's Watch List is a list of members that are deemed by FICC to pose a heightened risk to it and its members based on credit ratings and other factors.[16]

Specifically, the Watch List is the list of members with credit ratings derived from FICC's Credit Risk Rating Matrix (''CRRM'')[17] of 5, 6 or 7, as well as members that, based on FICC's consideration of relevant factors, including those set forth in Section 12(d) of GSD Rule 3 (Ongoing Membership Requirements)[18] and Section 11(d) of MBSD Rule 3 (Ongoing Membership Requirements),[19] are deemed by FICC to pose a heightened risk to it and its members.

In addition to the Watch List, FICC also maintains a separate list of members subject to enhanced surveillance in accordance with the provisions of GSD Rule 3 and MBSD Rule 3, as discussed below. The enhanced surveillance list is a list of members for which FICC has heightened credit concerns, which may include members that are already, or may soon be, on the Watch List. As described below, a member is subject to the same potential consequences from being subject to enhanced surveillance or being placed on the Watch List.

GSD Rule 3 (Ongoing Membership Requirements) and MBSD Rule 3 (Ongoing Membership Requirements)

GSD Rule 3 (Ongoing Membership Requirements) and MBSD Rule 3 (Ongoing Membership Requirements) specify the ongoing membership requirements and monitoring applicable to members.[20]

Section 7 of GSD Rule 3 and Section 6 of MBSD Rule 3 provide that FICC may review the financial responsibility and operational capability of a member and otherwise require from the member additional reporting of its financial or operational condition in order to make a determination as to whether such member should be placed on the Watch List and/or be subject to enhanced surveillance by FICC consistent with the provisions of Section 12 of GSD Rule 3 and Section 11 of MBSD Rule 3.

Section 12(b) of GSD Rule 3 and Section 11(b) of MBSD Rule 3 provide that a member that is (1) a U.S. bank or trust company that files the Consolidated Report of Condition and Income (''Call Report''), (2) a U.S. broker-dealer that files the Financial and Operational Combined Uniform Single Report (''FOCUS Report'') or the equivalent with its regulator, or (3) a non-U.S. bank or trust company that has audited financial data that is publicly available, will be assigned a credit rating by FICC in accordance with the CRRM. A member's credit rating is reassessed each time the member provides FICC with requested information pursuant to Section 7 of GSD Rule 3, Section 6 of MBSD Rule 3 or as may be otherwise required under the Rules.

Section 12(b) of GSD Rule 3 and Section 11(b) of MBSD Rule 3 further provide that because the factors used as part of the CRRM may not identify all risks that a member assigned a credit rating by FICC may present to FICC, FICC may, in its discretion, override such member's credit rating derived from the CRRM to downgrade the member. This downgrading may result in the member being placed on the Watch List and/or it may subject the member to enhanced surveillance based on relevant factors.

Section 12(c) of GSD Rule 3 and Section 11(c) of MBSD Rule 3 provide that members other than those specified in Section 12(b) of GSD Rule 3 and Section 11(b) of MBSD Rule 3 will not be assigned a credit rating by the CRRM but may be placed on the Watch List and/or may be subject to enhanced surveillance based on relevant factors.

Section 12(d) of GSD Rule 3 and Section 11(d) of MBSD Rule 3 provide that the factors to be considered by FICC in determining whether a member is

[16] *See* GSD Rule 1 (Definitions) and MBSD Rule 1 (Definitions), *supra* note 3.

[17] FICC's CRRM is a matrix of credit ratings of members specified in Section 12 of GSD Rule 3 and Section 11 of MBSD Rule 3. The CRRM is developed by FICC to evaluate the credit risk members pose to FICC and its members and is based on factors determined to be relevant by FICC from time to time, which factors are designed to collectively reflect the financial and operational condition of a member. These factors include (i) quantitative factors, such as capital, assets, earnings, and liquidity, and (ii) qualitative factors, such as management quality, market position/environment, and capital and liquidity risk management. *See* GSD Rule 1 (Definitions) and MBSD Rule 1 (Definitions), *supra* note 3.

[18] GSD Rule 3 (Ongoing Membership Requirements), Section 12(d), *supra* note 3.

[19] MBSD Rule 3 (Ongoing Membership Requirements), Section 11(d), *supra* note 3.

[20] GSD Rule 3 (Ongoing Membership Requirements) and MBSD Rule 3 (Ongoing Membership Requirements), *supra* note 3.

placed on the Watch List and/or subject to enhanced surveillance include (i) news reports and/or regulatory observations that raise reasonable concerns relating to the member, (ii) reasonable concerns around the member's liquidity arrangements, (iii) material changes to the member's organizational structure, (iv) reasonable concerns about the member's financial stability due to particular facts and circumstances, such as material litigation or other legal and/or regulatory risks, (v) failure of the member to demonstrate satisfactory financial condition or operational capability or if FICC has a reasonable concern regarding the member's ability to maintain applicable membership standards, and (vi) failure of the member to provide information required by FICC to assess risk exposure posed by the member's activity.

Section 12(e) of GSD Rule 3 and Section 11(e) of MBSD Rule 3 provide that FICC may require a member that has been placed on the Watch List to make and maintain a deposit to the Clearing Fund over and above the amount determined in accordance with GSD Rule 4 or MBSD Rule 4, as applicable (which additional deposit shall constitute a portion of the member's Required Fund Deposit) or such higher amount as FICC may deem necessary for the protection of it or other members.

Section 12(f) of GSD Rule 3 and Section 11(f) of MBSD Rule 3 provide that a member being subject to enhanced surveillance or being placed on the Watch List (1) will result in a more thorough monitoring of the member's financial condition and/or operational capability, including on-site visits or additional due diligence information requests, and (2) may be required make more frequent financial disclosures to FICC. Members that are placed on the Watch List or subject to enhanced surveillance are also reported to FICC's management committees and regularly reviewed by FICC senior management.

(iv) Proposed Rule Changes

A. Changes To Enhance FICC's Capital Requirements

As noted earlier, as a CCP, FICC is exposed to the credit risks of its members. The credit risks borne by FICC are mitigated, in part, by the capital maintained by members, which serves as a loss-absorbing buffer.

FICC's financial responsibility standards for members generally require members to have and maintain certain levels of capital.

As described in more detail below, FICC proposes to enhance its capital requirements for members as follows:

GSD Netting Members

Bank Netting Members

FICC proposes to (1) change the measure of capital requirements for banks and trust companies from equity capital to common equity tier 1 capital (''CET1 Capital''),[21] (2) raise the minimum capital requirements for banks and trust companies, and (3) require U.S. banks and trust companies to be well capitalized (''Well Capitalized'') as defined in the capital adequacy rules and regulations of the Federal Deposit Insurance Corporation (''FDIC'').[22]

FICC proposes to change the measure of capital requirements for banks and trust companies from equity capital to CET1 Capital and raise the minimum capital requirements for banks and trust companies in order to align FICC's capital requirements with banking regulators' changes to regulatory capital requirements over the past several years, which have standardized and harmonized the calculation and measurement of bank capital and leverage throughout the world.[23] Consistent with these changes by banking regulators, FICC believes that the appropriate capital measure for members that are banks and trust companies should be CET1 Capital and that FICC's capital requirements for members should be enhanced in light of these increased regulatory capital requirements.

In addition, requiring U.S. banks and trust companies to be Well Capitalized ensures that members are well capitalized while also allowing adjusted capital to be relative to either the risk-weighted assets or average total assets of the bank or trust company. FICC proposes to have the definition of Well Capitalized expressly tied to the FDIC's definition of ''well capitalized'' to ensure that the proposed requirement that U.S. banks and trust companies be Well Capitalized will keep pace with future changes to banking regulators' regulatory capital requirements.

Under the proposal, a Bank Netting Member that is a U.S. bank or trust company must have and maintain at least $500 million in CET1 Capital and be Well Capitalized. Under the proposal, a Bank Netting Member that is a bank or trust company established or chartered under the laws of a non-U.S. jurisdiction and applying through its U.S. branch or agency must (i) have CET1 Capital of at least $500 million, (ii) comply with the minimum capital requirements (including, but not limited to, any capital conservation buffer, countercyclical buffer, and any Domestic Systemically Important Banks (''D–SIB'') or Global Systemically Important Bank (''G–SIB'') buffer, if applicable) and capital ratios required by its home country regulator, or, if greater, with such minimum capital requirements or capital ratios standards promulgated by the Basel Committee on Banking Supervision and (iii) provide an attestation for itself, its parent bank and its parent bank holding company (as applicable) detailing the minimum capital requirements (including, but not limited to, any capital conservation buffer, countercyclical buffer, and any D–SIB or G–SIB buffer, if applicable) and capital ratios required by their home country regulator.

Dealer Netting Members

FICC proposes to leave the capital requirements applicable to Dealer Netting Members unchanged, however FICC proposes to (i) consolidate into a single paragraph the capital requirements applicable to Dealer Netting Members, (ii) expressly provide for equivalence among measures of Excess Net Capital, Excess Liquid Capital and Excess Adjusted Net Capital, depending on what the Dealer Netting Member is required to report on its regulatory filings, and (iii) make some clarifying and conforming language changes and add a paragraph heading to improve the accessibility and transparency of the capital requirements, without substantive effect.

FICC also proposes to clarify that an applicant must satisfy its applicable capital requirements when it applies for membership and at all times thereafter, and therefore proposes to delete language requiring that a member satisfy its capital requirements as of the end of the calendar month prior to the effective date of its membership.

[21] Under the proposal, CET1 Capital would be defined as an entity's common equity tier 1 capital, calculated in accordance with such entity's regulatory and/or statutory requirements.

[22] *See* 12 CFR 324.403(b)(1).

[23] *Compare, e.g.,* 12 CFR 324.20(b) (FDIC's definition of CET1 Capital), and Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, Article 26, *available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R0575* (European Union's definition of CET1 Capital), with Basel Committee on Banking Supervision, Basel III Standards, CAP10.6, *supra* note 6 (Basel III Standards' definition of CET1 Capital).

Futures Commission Merchant Netting Members

FICC proposes to leave the capital requirements applicable to Futures Commission Merchant Netting Members unchanged, however FICC proposes to (i) expressly provide for equivalence among measures of Excess Adjusted Net Capital, Excess Net Capital and Excess Liquid Capital, depending on what the Futures Commission Merchant Netting Member is required to report on its regulatory filings, and (ii) make some clarifying and conforming language changes and add a paragraph heading to improve the accessibility and transparency of the capital requirements, without substantive effect.

FICC also proposes to clarify that an applicant must satisfy its applicable capital requirements when it applies for membership and at all times thereafter, and therefore proposes to delete language requiring that a member satisfy its capital requirements as of the end of the calendar month prior to the effective date of its membership.

Inter-Dealer Broker Netting Members

FICC proposes to leave the capital requirements applicable to Inter-Dealer Broker Netting Members unchanged, however FICC proposes to (i) consolidate into a single paragraph the capital requirements applicable to Inter-Dealer Broker Netting Members, (ii) expressly provide for equivalence among measures of Excess Net Capital, Excess Liquid Capital and Excess Adjusted Net Capital, depending on what the Inter-Dealer Broker Netting Member is required to report on its regulatory filings, and (iii) make some clarifying and conforming language changes and add a paragraph heading to improve the accessibility and transparency of the capital requirements, without substantive effect.

FICC also proposes to clarify that an applicant must satisfy its applicable capital requirements when it applies for membership and at all times thereafter, and therefore proposes to delete language requiring that a member satisfy its capital requirements as of the end of the calendar month prior to the effective date of its membership.

Foreign Netting Members

Under the proposal, a Foreign Person that is a Foreign Netting Member must, at a minimum, satisfy its home country regulator's minimum financial requirements in addition to the following:

(1) In the case of a Foreign Person that is a broker or dealer, it must have total equity capital of at least $25 million; and

(2) in the case of a Foreign Person that is a bank or trust company established or chartered under the laws of a non-U.S. jurisdiction (and not applying to become a Bank Netting Member through a U.S. branch or agency), it must (i) have CET1 Capital of at least $500 million, (ii) comply with the minimum capital requirements (including, but not limited to, any capital conservation buffer, countercyclical buffer, and any D–SIB or G–SIB buffer, if applicable) and capital ratios required by its home country regulator, or, if greater, with such minimum capital requirements or capital ratios standards promulgated by the Basel Committee on Banking Supervision and (iii) provide an attestation for itself and its parent bank holding company detailing the minimum capital requirements (including, but not limited to, any capital conservation buffer, countercyclical buffer, and any D–SIB or G–SIB buffer, if applicable) and capital ratios required by their home country regulator.

FICC may, based on information provided by or concerning an applicant applying to become a Foreign Netting Member, also assign minimum financial requirements for the applicant based on (i) how closely the applicant resembles another existing category of Netting Member and (ii) the applicant's risk profile, which assigned minimum financial requirements would be promptly communicated to, and discussed with, the applicant.

As described above, under Section 4(b) of GSD Rule 2A, the current minimum capital requirements for a member that does not prepare its financial statements in accordance with U.S. GAAP is subject to a multiplier that requires such member to have capital between 1½ to 7 times the otherwise-applicable capital requirement.

The multiplier was designed to account for the less transparent nature of accounting standards other than U.S. GAAP. However, accounting standards have converged over the years (namely IFRS and U.S. GAAP).[24] As such, FICC believes the multiplier is no longer necessary and its retirement would be a welcomed simplification for both FICC and its members.

Accordingly, FICC proposes to delete the language in Section 4(b) of GSD Rule 2A providing that the minimum capital requirements for a member that does not prepare its financial statements in accordance with U.S. GAAP is subject to a multiplier that requires such member to have capital between 1½ to 7 times the otherwise-applicable capital requirement.

As described above, FICC also proposes that non-U.S. banks and trust companies be compliant with the minimum capital requirements and capital ratios in their home jurisdiction. Given the difficulty in knowing and monitoring compliance with various regulatory minimums for various jurisdictions, these members would be required to provide FICC with periodic attestations relating to the minimum capital requirements and capital ratios for their home jurisdiction, as described in greater detail below.

In GSD Rule 3, FICC proposes to add a paragraph providing that a Netting Member that is a bank or trust company established or chartered under the laws of a non-U.S. jurisdiction and a Bank Netting Member that is a U.S. branch or agency must (i) provide, no less than annually and upon request by FICC, an attestation for itself, its parent bank and its parent bank holding company (as applicable) detailing the minimum capital requirements (including, but not limited to, any capital conservation buffer, countercyclical buffer, and any D–SIB or G–SIB buffer, if applicable) and capital ratios required by their home country regulator and (ii) notify FICC: (a) Within two Business Days of any of their capital requirements (including, but not limited to, any capital conservation buffer, countercyclical buffer, and any D–SIB or G–SIB buffer, if applicable) or capital ratios falling below any minimum required by their home country regulator; and (b) within 15 calendar days of any such minimum capital requirement or capital ratio changing.

[24] The convergence between IFRS and U.S. GAAP began with the 2002 Norwalk Agreement (*available at https://www.ifrs.org/content/dam/ifrs/around-the-world/mous/norwalk-agreement-2002.pdf.*). Under that agreement, the Financial Accounting Standards Board (''FASB'') and the International Accounting Standards Board (''IASB'') signed a memorandum of understanding on the convergence of accounting standards. Between 2010 and 2013, FASB and IASB published several quarterly progress reports on their work to improve and achieve convergence of U.S. GAAP and IFRS. In 2013, the International Financial Reporting Standards Foundation established the Accounting Standards Advisory Forum (''ASAF'') to improve cooperation among worldwide standard setters and advise the IASB as it developed IFRS. (*See https://www.ifrs.org/groups/accounting-standards-advisory-forum/.*) FASB was selected as one of the ASAF's twelve members. FASB's membership on the ASAF helps represent U.S. interests in the IASB's standard-setting process and continues the process of improving and converging U.S. GAAP and IFRS. In February 2013, the Journal of Accountancy published its view of the success of the convergence project citing converged or partially converged standards, including business combinations, discontinued operations, fair value measurement, and share-base payments. (*Available at https://www.journalofaccountancy.com/issues/2013/feb/20126984.html.*) Subsequent to the publication, IASB and FASB converge on revenue recognition. While IASB and FASB have not achieved full convergence, FICC believes the accounting rules are sufficiently aligned such that the multiplier is no longer required.

FICC also proposes to require Bank Netting Members that are U.S. branches or agencies of non-U.S. banks or trust companies, in addition to Foreign Netting Members, to provide FICC copies of any regulatory notifications required to be made when an entity does not comply with the financial reporting and responsibility standards set by their home country regulator and to notify FICC in writing within 2 Business Days of becoming subject to a disciplinary action by their home country regulator.

Government Securities Issuer Netting Members

FICC proposes to require that a Government Securities Issuer Netting Member or an applicant to become a Government Securities Issuer Netting Member must have equity capital of at least $100 million. FICC does not currently have a capital requirement for Government Securities Issuer Netting Members or applicants to become a Government Securities Issuer Netting Member.

Insurance Company Netting Members

FICC proposes to leave the capital requirements applicable to Insurance Company Netting Members unchanged, however FICC proposes to (i) specify the calculation of the existing risk-based capital ratio and (ii) correct typographical errors and make some clarifying and conforming language changes and add a paragraph heading to improve the accessibility and transparency of the capital requirements, without substantive effect.[25]

FICC also proposes to clarify that an applicant must satisfy its applicable capital requirements when it applies for membership and at all times thereafter, and therefore proposes to delete language requiring that a member satisfy its capital requirements as of the end of the calendar month prior to the effective date of its membership.

Registered Investment Company Netting Members

FICC proposes to leave the capital requirements applicable to Registered Investment Company Netting Members unchanged, however FICC proposes to make some clarifying and conforming language changes and add a paragraph heading to improve the accessibility and transparency of the capital requirements, without substantive effect.

Other Netting Members

For Netting Members not otherwise addressed in Section 4(b)(ii) of GSD Rule 2A, FICC proposes that such Netting Members be in compliance with their regulator's minimum financial requirements. FICC may, based on information provided by or concerning an applicant applying to become a Netting Member, also assign minimum financial requirements for the applicant based on (i) how closely the applicant resembles an existing category of Netting Member and (ii) the applicant's risk profile, which assigned minimum financial requirements would be promptly communicated to, and discussed with, the applicant.

GSD Rule 1

In connection with its proposal to enhance capital requirements for members, FICC proposes to add to GSD Rule 1 new defined terms of ''CET1 Capital,'' ''Tier 1 RBC Ratio'' and ''Well Capitalized,'' as described above.

Other Proposed Changes to GSD Rule 2A

Section 1

FICC proposes to revise, without substantive effect, language in Section 1 of GSD Rule 2A to improve readability and accessibility.

Sections 2 and 3

FICC proposes to renumber existing Section 3 of GSD Rule 2A as Section 2 and renumber existing Section 2 of GSD Rule 2A as Section 3 in order for the eligibility requirements for Comparison-Only Members set forth in Section 1 of GSD Rule 2A to be immediately followed by the membership qualifications and standards for Comparison-Only Members. In connection therewith, FICC proposes to revise the heading of the newly renumbered Section 2 to clarify that such section specifies the membership qualifications and standards for Comparison-Only Members.

FICC proposes to revise newly renumbered Section 3 to clarify that such section sets forth the eligibility requirements for each category of Netting Member. FICC also proposes to add a heading to the eligibility requirements for each category of Netting Member to improve readability and accessibility.

In Section 3(a)(v), FICC proposes to correct an incorrect reference to a Foreign Netting Member and incorrect references to GSD's rules and procedures.

In Section 3(a)(vi), FICC proposes to clarify that a Government Securities Issuer Netting Member is a Government Securities Issuer or Government Sponsored Enterprise whose membership in the Netting System has not been terminated. As described below, FICC proposes to add a new defined term of Government Sponsored Enterprise to GSD Rule 1 as this term was inadvertently not included in the definition of a Government Securities Issuer Netting Member in Section 3(a)(vi) of GSD Rule 2A or in the defined terms in GSD Rule 1.

FICC proposes to add a new Section 3(a)(vii) describing the eligibility requirements for an Insurance Company Netting Member based on the definition of such category of Netting Member in GSD Rule 1, which has been inadvertently omitted from the list of categories of Netting Members in Section 3. FICC also proposes to renumber the remaining paragraphs of Section 3, as well as any affected cross-references, accordingly.

In Section 3(b), FICC proposes to clarify that a Person may be only one category of Netting Member at a time and that if a Person qualifies for more than one category of Netting Member, FICC, in its sole discretion, may determine the category of Netting Member for which that Person will be considered.

Section 4

FICC proposes to revise Section 4(a) of GSD Rule 2A to provide that an applicant to be a Netting Member that is already a Comparison-Only Member is required to continue to meet the requirements for becoming a Comparison-Only Member set forth in GSD Rule 2A, and to delete language regarding such requirements that is to be superseded by the proposed revisions to the Netting Member capital requirements set forth in Section 4(b).

At the end of Section 4(b), FICC proposes to clarify its existing policy that the Netting Member financial responsibility standards set forth in Section 4(b) are only the minimum requirements and make explicit that the Board, based upon the level of the anticipated positions and obligations of the applicant, the anticipated risk associated with the volume and types of transactions the applicant proposes to process through FICC, and the overall financial condition of the applicant, may, in its sole discretion, impose heightened or different financial responsibility standards on any applicant.

FICC also proposes to clarify its existing practice that if an applicant

[25] As described below, FICC proposes to add a new Section 3(a)(vii) to GSD Rule 2A describing the eligibility requirements for an Insurance Company Netting Member, which was inadvertently omitted from the list of categories of Netting Members in Section 3.

does not itself satisfy the required minimum financial responsibility standards, the Board may include for such purposes the financial resources of the parent company of the applicant (including, in the case of an applicant that is a U.S. branch or agency, its parent bank) if the parent company has delivered to FICC a guaranty, satisfactory in form and substance to the Board, of the obligations of the applicant to FICC.

FICC proposes to make Section 4(c) the very end of Section 4 to improve readability and accessibility by not separating the Netting Member financial responsibility standards set forth in Section 4(b) with the above-described statements regarding the Board's existing authority to impose heightened or different financial responsibility standards or to consider the financial resources of a parent company.

GSD Funds-Only Settling Bank Members

FICC proposes to require that any Funds-Only Settling Bank that, in accordance with such entity's regulatory and/or statutory requirements, calculates a Tier 1 RBC Ratio must have a Tier 1 RBC Ratio [26] equal to or greater than the Tier 1 RBC Ratio that would be required for such Funds-Only Settling Bank to be Well Capitalized. FICC does not currently have a capital requirement for Funds-Only Settling Banks.

GSD Sponsoring Members

FICC proposes to leave the required equity capital for a Bank Netting Member applying to become a Category 1 Sponsoring Member unchanged, however FICC proposes to (i) replace the previous references to such Bank Netting Member or its bank holding company being ''well-capitalized'' with the new defined term Well Capitalized and (ii) make some clarifying and conforming language changes to improve the accessibility and transparency of the capital requirements, without substantive effect.

FICC also proposes to clarify that an applicant must satisfy its applicable capital requirements when it applies for membership and at all times thereafter, and therefore proposes to delete language requiring that a member satisfy its capital requirements as of the end of the calendar month prior to the effective date of its membership.

[26] Under the proposal, Tier 1 RBC Ratio is the ratio of an entity's tier 1 capital to its total risk-weighted assets, calculated in accordance with such entity's regulatory and/or statutory requirements.

GSD CCIT Members

FICC proposes to leave the capital requirements for a CCIT Member unchanged, but delete the language in Section 2(a)(ii) of GSD Rule 3B providing that the minimum capital requirements for a CCIT Member that does not prepare its financial statements in accordance with U.S. GAAP is subject to a multiplier that requires such CCIT Member to have capital between 1½ to 7 times the otherwise-applicable capital requirement.

As described above, the multiplier was designed to account for the less transparent nature of accounting standards other than U.S. GAAP. However, accounting standards have converged over the years (namely IFRS and U.S. GAAP).[27] As such, FICC believes the multiplier is no longer necessary and its retirement would be a welcomed simplification for both FICC and its members.

FICC also proposes to revise the heading and introductory sentence of Section 2 of GSD Rule 3B to clarify that, in addition to the eligibility requirements for becoming a CCIT Member, such section also includes qualifications and standards requirements for CCIT Members. FICC also proposes to add a heading of ''Minimum Financial Requirements'' to Section 2(a)(ii) for consistency with the other subsections in Section 2(a).

In Section 5 of GSD Rule 3B, FICC proposes to fix a typographical error in the heading and clarify existing language that the eligibility, qualifications and standards set forth in respect of an applicant shall continue to be met upon an applicant's admission as a CCIT Member and at all times while a CCIT Member.

MBSD Clearing Members

Bank Clearing Members

FICC proposes to (1) change the measure of capital requirements for banks and trust companies from equity capital to CET1 Capital,[28] (2) raise the minimum capital requirements for banks and trust companies, and (3) require U.S. banks and trust companies to be Well Capitalized as defined in the capital adequacy rules and regulations of the FDIC.[29]

FICC proposes to change the measure of capital requirements for banks and trust companies from equity capital to CET1 Capital and raise the minimum capital requirements for banks and trust companies in order to align FICC's capital requirements with banking regulators' changes to regulatory capital requirements over the past several years, which have standardized and harmonized the calculation and measurement of bank capital and leverage throughout the world.[30] Consistent with these changes by banking regulators, FICC believes that the appropriate capital measure for members that are banks and trust companies should be CET1 Capital and that FICC's capital requirements for members should be enhanced in light of these increased regulatory capital requirements.

In addition, requiring U.S. banks and trust companies to be Well Capitalized ensures that members are well capitalized while also allowing adjusted capital to be relative to either the risk-weighted assets or average total assets of the bank or trust company. FICC proposes to have the definition of Well Capitalized expressly tied to the FDIC's definition of ''well capitalized'' to ensure that the proposed requirement that U.S. banks and trust companies be Well Capitalized will keep pace with future changes to banking regulators' regulatory capital requirements.

Under the proposal, a Bank Clearing Member that is a U.S. bank or trust company must have and maintain at least $500 million in CET1 Capital and be Well Capitalized. Under the proposal, a Bank Clearing Member that is a bank or trust company established or chartered under the laws of a non-U.S. jurisdiction and applying through its U.S. branch or agency must (i) have CET1 Capital of at least $500 million, (ii) comply with the minimum capital requirements (including, but not limited to, any capital conservation buffer, countercyclical buffer, and any D–SIB or G–SIB buffer, if applicable) and capital ratios required by its home country regulator, or, if greater, with such minimum capital requirements or capital ratios standards promulgated by the Basel Committee on Banking Supervision and (iii) provide an attestation for itself, its parent bank and its parent bank holding company (as applicable) detailing the minimum capital requirements (including, but not limited to, any capital conservation buffer, countercyclical buffer, and any D–SIB or G–SIB buffer, if applicable) and capital ratios required by their home country regulator.

[27] *Supra* note 24.

[28] Under the proposal, CET1 Capital would be defined as an entity's common equity tier 1 capital, calculated in accordance with such entity's regulatory and/or statutory requirements.

[29] *See* 12 CFR 324.403(b)(1).

[30] *See supra* note 23.

Dealer Clearing Members

FICC proposes to leave the capital requirements applicable to Dealer Clearing Members unchanged, however FICC proposes to (i) expressly provide for equivalence among measures of Excess Net Capital, Excess Liquid Capital [31] and Excess Adjusted Net Capital,[32] depending on what the Dealer Clearing Member is required to report on its regulatory filings, and (ii) make some clarifying and conforming language changes and add a paragraph heading to improve the accessibility and transparency of the capital requirements, without substantive effect.

FICC also proposes to clarify that an applicant must satisfy its applicable capital requirements when it applies for membership and at all times thereafter, and therefore proposes to delete language requiring that a member satisfy its capital requirements as of the end of the calendar month prior to the effective date of its membership.

Inter-Dealer Broker Clearing Members

FICC proposes to leave the Excess Net Capital requirement applicable to Inter-Dealer Broker Clearing Members unchanged, however FICC proposes to (i) require Inter-Dealer Broker Clearing Members to have Net Worth of $25 million, (ii) expressly provide for equivalence among measures of Excess Net Capital, Excess Liquid Capital and Excess Adjusted Net Capital, depending on what the Inter-Dealer Broker Clearing Member is required to report on its regulatory filings, and (iii) make some clarifying and conforming language changes to improve the accessibility and transparency of the capital requirements, without substantive effect.

FICC also proposes to clarify that an applicant must satisfy its applicable capital requirements when it applies for membership and at all times thereafter, and therefore proposes to delete language requiring that a member satisfy its capital requirements as of the end of the calendar month prior to the effective date of its membership.

Unregistered Investment Pool Clearing Members

FICC proposes to leave the requirements applicable to Unregistered Investment Pool Clearing Members unchanged, however FICC proposes to (i) consolidate under one heading the requirements applicable to Unregistered Investment Pool Clearing Members and (ii) make some clarifying and conforming language changes to improve the accessibility and transparency of the requirements, without substantive effect.

Government Securities Issuer Clearing Members

FICC proposes to leave the capital requirements applicable to Government Securities Issuer Clearing Members unchanged, however FICC proposes to make some clarifying and conforming language changes and add a paragraph heading to improve the accessibility and transparency of the capital requirements, without substantive effect.

Insured Credit Union Clearing Members

FICC proposes to leave the capital requirements applicable to Insured Credit Union Clearing Members unchanged, however FICC proposes to make some clarifying and conforming language changes and add a paragraph heading to improve the accessibility and transparency of the capital requirements, without substantive effect.

Registered Investment Company Clearing Members

FICC proposes to leave the capital requirements applicable to Registered Investment Company Clearing Members unchanged, however FICC proposes to make some clarifying and conforming language changes and add a paragraph heading to improve the accessibility and transparency of the capital requirements, without substantive effect.

Foreign Members

Under the proposal, a Foreign Person that is a Clearing Member must, at a minimum, satisfy its home country regulator's minimum financial requirements in addition to the following:

(1) In the case of a Foreign Person that is a broker or dealer (and not applying to become a Dealer Clearing Member or Inter-Dealer Broker Clearing Member), it must have total equity capital of at least $25 million; and

(2) in the case of a Foreign Person that is a bank or trust company established or chartered under the laws of a non-U.S. jurisdiction (and not applying to become a Bank Clearing Member through a U.S. branch or agency), it must (i) have CET1 Capital of at least $500 million, (ii) comply with the minimum capital requirements (including, but not limited to, any capital conservation buffer, countercyclical buffer, and any D–SIB or G–SIB buffer, if applicable) and capital ratios required by its home country regulator, or, if greater, with such minimum capital requirements or capital ratios standards promulgated by the Basel Committee on Banking Supervision and (iii) provide an attestation for itself and its parent bank holding company detailing the minimum capital requirements (including, but not limited to, any capital conservation buffer, countercyclical buffer, and any D–SIB or G–SIB buffer, if applicable) and capital ratios required by their home country regulator.

FICC may, based on information provided by or concerning an applicant that is a Foreign Person, also assign minimum financial requirements for the applicant based on (i) how closely the applicant resembles another existing category of Clearing Member and (ii) the applicant's risk profile, which assigned minimum financial requirements would be promptly communicated to, and discussed with, the applicant.

As described above, under Section 2(e)(ii) of MBSD Rule 2A, the current minimum capital requirements for a member that does not prepare its financial statements in accordance with U.S. GAAP is subject to a multiplier that requires such member to have capital between 1½ to 7 times the otherwise-applicable capital requirement.

The multiplier was designed to account for the less transparent nature of accounting standards other than U.S. GAAP. However, accounting standards have converged over the years (namely IFRS and U.S. GAAP).[33] As such, FICC believes the multiplier is no longer necessary and its retirement would be a welcomed simplification for both FICC and its members.

Accordingly, FICC proposes to delete the language in Section 2(e)(ii) of MBSD Rule 2A providing that the minimum capital requirements for a member that does not prepare its financial statements in accordance with U.S. GAAP is subject to a multiplier that requires such member to have capital between 1½ to

[31] Under the proposal, Excess Liquid Capital would be defined as the difference between the Liquid Capital of a Government Securities Broker or Government Securities Dealer and the minimum Liquid Capital that such Government Securities Broker or Government Securities Dealer must have to comply with the requirements of 17 CFR Section 402.2(a), (b) and (c), or any successor rule or regulation thereto. FICC also proposes to add to MBSD Rule 1 related defined terms of Liquid Capital, Government Securities Broker and Government Securities Dealer, in each case identical to the definitions of such terms in the GSD Rules.

[32] Under the proposal, Excess Adjusted Net Capital would be defined as the difference between the adjusted net capital of a Futures Commission Merchant and the minimum adjusted net capital that such Futures Commission Merchant must have to comply with the requirements of 17 CFR Section 1.17(a)(1) or (a)(2), or any successor rule or regulation thereto. FICC also proposes to add to MBSD Rule 1 a related defined term of Futures Commission Merchant identical to the definition of such term in the GSD Rules.

[33] *Supra* note 24.

7 times the otherwise-applicable capital requirement.

As described above, FICC also proposes that non-U.S. banks and trust companies be compliant with the minimum capital requirements and capital ratios in their home jurisdiction. Given the difficulty in knowing and monitoring compliance with various regulatory minimums for various jurisdictions, these members would be required to provide FICC with periodic attestations relating to the minimum capital requirements and capital ratios for their home jurisdiction, as described in greater detail below.

In MBSD Rule 3, FICC proposes to add a paragraph providing that a Clearing Member that is a bank or trust company established or chartered under the laws of a non-U.S. jurisdiction and a Bank Clearing Member that is a U.S. branch or agency must (i) provide, no less than annually and upon request by FICC, an attestation for itself, its parent bank and its parent bank holding company (as applicable) detailing the minimum capital requirements (including, but not limited to, any capital conservation buffer, countercyclical buffer, and any D–SIB or G–SIB buffer, if applicable) and capital ratios required by their home country regulator and (ii) notify FICC: (a) Within two Business Days of any of their capital requirements (including, but not limited to, any capital conservation buffer, countercyclical buffer, and any D–SIB or G–SIB buffer, if applicable) or capital ratios falling below any minimum required by their home country regulator; and (b) within 15 calendar days of any such minimum capital requirement or capital ratio changing.

FICC also proposes to require Foreign Members that are regulated by their home country regulator and Bank Clearing Members that are U.S. branches or agencies of non-U.S. banks or trust companies to provide FICC copies of any regulatory notifications required to be made when an entity does not comply with the financial reporting and responsibility standards set by their home country regulator and to notify FICC in writing within 2 Business Days of becoming subject to a disciplinary action by their home country regulator.

Other Clearing Members

For Clearing Members not otherwise addressed in Section 2(e)(ii) of MBSD Rule 2A, FICC proposes that such Clearing Members be in compliance with their regulator's minimum financial requirements. FICC may, based on information provided by or concerning an applicant applying to become a Clearing Member, also assign minimum financial requirements for the applicant based on (i) how closely the applicant resembles an existing category of Clearing Member and (ii) the applicant's risk profile, which assigned minimum financial requirements would be promptly communicated to, and discussed with, the applicant.

Other Proposed Changes to MBSD Rule 2A

Section 1

FICC proposes to revise Section 1 of MBSD Rule 2A to clarify that such section sets forth the eligibility requirements for each category of Clearing Member. FICC also proposes to add a heading to each of the eligibility requirements for each category of Clearing Member to improve readability and accessibility.

In paragraph (d), FICC proposes to clarify that a Person is eligible to apply to become an Unregistered Investment Pool Clearing Member if it is an Unregistered Investment Pool and that an Unregistered Investment Pool Clearing Member is an Unregistered Investment Pool whose membership in the Clearing System has not been terminated.

In paragraph (f), FICC proposes to clarify that a Person is eligible to apply to become an Insurance Company Clearing Member if it is an Insurance Company in good standing with its primary regulator.

In paragraph (g), FICC proposes to clarify that a Person is eligible to apply to become a Registered Clearing Agency Member if it is a Registered Clearing Agency in good standing with its primary regulator.

In the next to last paragraph of Section 1, FICC proposes to correct an incorrect pluralization of the word ''category'' and a potentially confusing consolidation of two defined terms.

In the last paragraph of Section 1, FICC proposes to correct an incorrect reference to a Clearing Member that is a Foreign Person and incorrect references to MBSD's rules and procedures.

Section 2

FICC proposes to revise the introductory sentence to Section 2 of MBSD Rule 2A to clarify that the Board's approval of an application to become a Clearing Member is subject to the limitations set forth in MBSD Rule 2A.

At the end of Section 2(e), FICC proposes to clarify its existing policy that the Clearing Member financial responsibility standards set forth in Section 2(e) are only the minimum requirements and make explicit that the Board, based upon the level of the anticipated positions and obligations of the applicant, the anticipated risk associated with the volume and types of transactions the applicant proposes to process through FICC, and the overall financial condition of the applicant, may, in its sole discretion, impose heightened or different financial responsibility standards on any applicant.

FICC also proposes to clarify its existing practice that if an applicant does not itself satisfy the required minimum financial responsibility standards, the Board may include for such purposes the financial resources of the parent company of the applicant (including, in the case of an applicant that is a U.S. branch or agency, its parent bank) if the parent company has delivered to FICC a guaranty, satisfactory in form and substance to the Board, of the obligations of the applicant to FICC.

FICC proposes to make Section 2(e) the very end of Section 2 to improve readability and accessibility by not separating the Clearing Member financial responsibility standards set forth in Section 2(e) with the above-described statements regarding the Board's existing authority to impose heightened or different financial responsibility standards or to consider the financial resources of a parent company.

MBSD Cash Settling Bank Members

FICC proposes to require that any Cash Settling Bank Member that, in accordance with such entity's regulatory and/or statutory requirements, calculates a Tier 1 RBC Ratio must have a Tier 1 RBC Ratio [34] equal to or greater than the Tier 1 RBC Ratio that would be required for such Cash Settling Bank Member to be Well Capitalized. FICC does not currently have a capital requirement for Cash Settling Bank Members. FICC also proposes to revise the title of MBSD Rule 3A to reflect the correct title for this membership category.

B. Changes to FICC's Watch List and Enhanced Surveillance List

FICC proposes to redefine the Watch List and eliminate the separate enhanced surveillance list and instead implement a new Watch List that consists of a relatively smaller group of members that pose heightened risk to FICC and its members.

FICC believes that the current system of having both a Watch List and an

[34] *See supra* note 26.

enhanced surveillance list has confused various FICC stakeholders, while the proposed approach, as FICC understands from its experience, will be more consistent with industry practices and understanding of a ''Watch List.''

The new Watch List would include members with a CRRM rating of 6 or 7, as well as members that are deemed by FICC to pose a heightened risk to it and its members. The separate enhanced surveillance list would be merged into the new Watch List and references to the separate enhanced surveillance list would be deleted from the Rules.

In sum, the new Watch List would consist of members on the existing enhanced surveillance list, members with a CRRM rating of 6 or 7, and any other members that are deemed by FICC to pose a heightened risk to it and its members.

The proposed change will mean that members with a CRRM rating of 5 would no longer automatically be included on the Watch List. Members with a CRRM rating of 5 represent the largest single CRRM rating category, but FICC does not believe all such members present heightened credit concerns.[35] Nevertheless, FICC would continue to have the authority to place a member on the new Watch List if it is deemed to pose a heightened risk to FICC and its members and/or to downgrade the CRRM rating of a member.

In GSD Rule 1, FICC proposes to update a reference to ''members'' in the definition of the Watch List to be a reference to the defined term ''Members.'' In Section 12 of GSD Rule 3, FICC proposes to update references to ''members'' with the defined term ''Members.'' FICC also proposes to clarify in Section 12(f) of GSD Rule 3 and Section 11(f) of MBSD Rule 3 that members on the Watch List are reported to FICC's management committees and regularly reviewed by FICC's senior management.

C. Certain Other Clarification Changes

In connection with the above-described changes to the Rules to enhance FICC's capital requirements for members and redefine the Watch List and eliminate the enhanced surveillance list, FICC proposes to make certain other clarification changes in order to improve the accessibility and transparency of the Rules including the following:

GSD Rules

In GSD Rule 1, FICC proposes to update cross-references in the definitions of ''Bank Netting Member,'' ''Dealer Netting Member,'' ''Foreign Netting Member,'' ''Futures Commission Merchant Netting Member,'' ''Government Securities Issuer Netting Member,'' ''Insurance Company Netting Member,'' ''Inter-Dealer Broker Netting Member,'' ''Registered Clearing Agency Netting Member'' and ''Registered Investment Company Netting Member'' to reflect the renumbering of Section 2 of GSD Rule 2A as Section 3.

FICC proposes to add a new defined term of ''Government Sponsored Enterprise'' in GSD Rule 1 which would be used in the revised definition of ''Government Securities Issuer Netting Member'' in Section 3 of GSD Rule 2A, from which such term was inadvertently omitted. The proposed definition of ''Government Sponsored Enterprise'' in GSD Rule 1 is the same as the definition of such term in MBSD Rule 1.[36]

FICC also proposes to revise the definition of ''Excess Capital Differential'' in GSD Rule 1 to replace the reference to ''Excess Capital'' with a reference to ''Netting Member Capital.'' FICC previously deleted the defined term ''Excess Capital'' from GSD Rule 1 and replaced it with the defined term ''Netting Member Capital'' [37] but inadvertently did not update the reference to ''Excess Capital'' in the defined term ''Excess Capital Differential'' with a reference to ''Netting Member Capital.''

In GSD Rule 2, FICC proposes to clarify that FICC would make its services available to applicants that meet the eligibility, qualifications and standards specified in the GSD Rules. FICC also proposes to separate a sentence specifying the GSD Rules governing Sponsored Members and Sponsoring Members, CCIT Members and Funds-Only Settling Bank Members into three separate sentences to improve accessibility and transparency.

In GSD Rule 3, FICC proposes to clarify existing language that the eligibility, qualifications and standards set forth in GSD Rule 2A in respect of an applicant shall continue to be met upon an applicant's admission as a Member and at all times while a Member. FICC also proposes to fix incorrect usages of certain defined terms, incorrect references to certain Exchange Act Rules, a reference to a ''domestic'' bank or trust company rather than a ''U.S.'' bank or trust company, as well as make other typographical and clarifying changes.

FICC proposes to revise the existing requirements in Sections 2(e) and (f) of GSD Rule 3 for Members established in the United Kingdom to provide FICC certain financial information and reports submitted to their regulators by expanding such requirement to include Members established in any non-U.S. jurisdiction, any financial information requested by FICC and any reports submitted to such Member's home country regulator.

FICC proposes to revise Sections 2(g) and 8 of GSD Rule 3 to clarify the circumstances when a Member is out of compliance with certain membership standards, and to move a sentence regarding when FICC begins to assess a premium to the Required Fund Deposit of a Member that falls below its minimum financial requirements.

FICC proposes to revise Section 2(h) of GSD Rule 3 to clarify that a parent company that has guaranteed the obligations of its subsidiary to FICC also includes, in the case of a Member that is a U.S. branch or agency, its parent bank.

In Section 7 of GSD Rule 2A, FICC proposes to update a reference to Section 3 of GSD Rule 2A with a reference to Section 2 to reflect the renumbering of such sections.

MBSD Rules

In MBSD Rule 1, FICC proposes to add a defined term for ''Registered Clearing Agency Member,'' which was inadvertently not included in the list of defined terms in MBSD Rule 1.

In MBSD Rule 2, FICC proposes to clarify that FICC will make its services available to applicants that meet the eligibility, qualifications and standards specified in the MBSD Rules, and to reflect that FICC, in addition to the Board, has the existing authority to approve certain membership applications.

In MBSD Rule 3, FICC proposes to clarify existing language that the eligibility, qualifications and standards set forth in MBSD Rule 2A in respect of an applicant shall continue to be met upon an applicant's admission as a Member and at all times while a Member. FICC also proposes to fix incorrect usages of certain defined terms, incorrect references to certain Exchange Act Rules, a reference to a ''domestic'' bank or trust company

[35] The majority of members with a CRRM rating of 5 are either rated ''investment grade'' by external rating agencies or, in the absence of external ratings, FICC believes are equivalent to investment grade, as many of these members are primary dealers and large foreign banks. A firm with a rating of ''investment grade'' is understood to be better able to make its payment obligations compared to a firm with a lesser rating, such as a rating of ''speculative.'' As such, among the total population, firms with investment grade ratings are generally considered good credit risk along a credit risk scale.

[36] MBSD Rule 1 (Definitions), *supra* note 3.

[37] *See* Securities Exchange Act Release Nos. 83362 (June 1, 2018), 83 FR 26514 (June 7, 2018) (SR–FICC–2018–001) and 83223 (May 11, 2018), 83 FR 23020 (May 17, 2018) (SR–FICC–2018–801).

rather than a ''U.S.'' bank or trust company, as well as make other typographical and clarifying changes.

FICC proposes to revise the existing requirements in Sections 2(d) and (e) of MBSD Rule 3 for Members established in the United Kingdom to provide FICC certain financial information and reports submitted to their regulators by expanding such requirement to include Members established in any non-U.S. jurisdiction, any financial information requested by FICC and any reports submitted to such Member's home country regulator.

FICC proposes to revise Section 2(g) of MBSD Rule 3 to clarify the circumstances when a Member is out of compliance with certain membership standards and how often a Member is required to provide unaudited financial information to FICC.

FICC proposes to revise Section 2(h) of MBSD Rule 3 to clarify that a parent company that has guaranteed the obligations of its subsidiary to FICC also includes, in the case of a Member that is a U.S. branch or agency, its parent bank, and to correct a grammatical error.

Member Outreach

Beginning in June 2019, FICC has conducted outreach to various members in order to provide them with advance notice of the proposed enhancements to FICC's capital requirements for members, the proposed redefinition of the Watch List, and the proposed elimination of the enhanced surveillance list. FICC has not conducted outreach to members providing them with advance notice of the proposed clarification changes to the Rules. FICC has not received any written feedback from members on the proposal. The Commission will be notified of any written comments received.

Implementation Timeframe

Pending Commission approval, FICC would implement the proposed changes to enhance its capital requirements for members, as well as the clarification changes to the Rules, one year after the Commission's approval of this proposed rule change. During that one-year period, FICC would periodically provide members with estimates of their capital requirements, based on the approved changes, with more outreach expected for members impacted by the changes. The deferred implementation for all members and the estimated capital requirements for members are designed to give members the opportunity to assess the impact of their enhanced capital requirements on their business profile. All members would be advised of the implementation date of these proposed changes through issuance of an FICC Important Notice, posted to its website. FICC also would inform firms applying for membership of the new capital requirements. Members and applicants should note that the methodology/processes used to set their initial capital requirements would be the same at implementation of the proposed changes as it would be on an ongoing basis.

FICC expects to implement the proposed changes to redefine the Watch List and eliminate the enhanced surveillance list within 90 days of Commission approval. All members would be advised of such implementation through issuance of an FICC Important Notice, posted to its website.

2. Statutory Basis

FICC believes that the proposed rule change is consistent with the requirements of the Exchange Act, and the rules and regulations thereunder applicable to a registered clearing agency. Specifically, FICC believes that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Exchange Act [38] and Rules 17Ad–22(b)(7), (e)(4)(i) and (e)(18),[39] each as promulgated under the Exchange Act, for the reasons described below.

Section 17A(b)(3)(F) of the Exchange Act requires, in part, that the Rules be designed to promote the prompt and accurate clearance and settlement of securities transactions.[40] As described above, the proposed rule changes would (1) enhance FICC's capital requirements for members, (2) redefine the Watch List and eliminate the enhanced surveillance list, and (3) make clarification changes to the Rules. FICC believes that enhancing its capital requirements for members, including continuing to recognize and account for varying members and memberships, would help ensure that members maintain sufficient capital to absorb losses arising out of their clearance and settlement activities at FICC and otherwise, and would help FICC more effectively manage and mitigate the credit risks posed by its members, which would in turn help FICC be better able to withstand such credit risks and continue to meet its clearance and settlement obligations to its members. Similarly, FICC believes that redefining the Watch List and eliminating the enhanced surveillance list, as described above, would help FICC better allocate its resources for monitoring the credit risks posed by its members, which would in turn help FICC more effectively manage and mitigate such credit risks so that FICC is better able to withstand such credit risks and continue to meet its clearance and settlement obligations to its members. FICC believes that making clarification changes to the Rules, including through the use of new defined terms, would help ensure that the Rules remain clear and accurate, which would in turn help facilitate members' understanding of the Rules and provide members with increased predictability and certainty regarding their rights and obligations with respect to FICC's clearance and settlement activities. Therefore, FICC believes that these proposed rule changes would promote the prompt and accurate clearance and settlement of securities transactions, consistent with Section 17A(b)(3)(F) of the Exchange Act.

Rule 17Ad–22(b)(7) under the Exchange Act requires, in part, that FICC establish, implement, maintain and enforce written policies and procedures reasonably designed to provide a person that maintains net capital equal to or greater than $50 million with the ability to obtain membership at FICC, provided that FICC may provide for a higher net capital requirement as a condition for membership if it demonstrates to the Commission that such a requirement is necessary to mitigate risks that could not otherwise be effectively managed by other measures.[41] As described above, FICC proposes to enhance its capital requirements for members. FICC believes that these proposed rule changes, while referencing capital measures other than net capital, would help ensure that members maintain sufficient capital to absorb losses arising out of their clearance and settlement activities at FICC and otherwise, and would help FICC more effectively manage and mitigate the credit risks posed by its members while providing fair and open access to membership at FICC. FICC believes that the proposed changes would utilize capital measures that are appropriately matched to the regulatory and other capital requirements applicable to the types of entities that apply for and have membership at FICC, which would in turn help facilitate members' understanding of and compliance with FICC's enhanced capital requirements. FICC also believes that these other capital measures are more appropriate measures of the capital available to members to absorb losses arising out of

[38] 15 U.S.C. 78q–1(b)(3)(F).

[39] 17 CFR 240.17Ad–22(b)(7), (e)(4)(i) and (e)(18).

[40] 15 U.S.C. 78q–1(b)(3)(F).

[41] 17 CFR 240.17Ad–22(b)(7).

their clearance and settlement activities at FICC than simply net capital because a member's net capital alone may not be available to absorb losses arising out of such activities. Thus, relying on measures beyond net capital would help members more effectively understand and manage the resources available to mitigate the credit risks they pose to FICC. In the case of those proposed rule changes that may require members such as U.S. banks and trust companies or non-U.S. banks and trust companies to maintain capital greater than $50 million, FICC believes that enhanced capital requirements for such members are necessary and appropriate in light of the regulatory and other capital requirements that such members face and the credit risks they pose to FICC, which would help FICC more effectively manage and mitigate such credit risks. Therefore, FICC believes that the enhanced capital requirements for members are necessary to mitigate risks that could not otherwise be effectively managed by other measures, consistent with Rule 17Ad–22(b)(7) under the Exchange Act.

Rule 17Ad–22(e)(4)(i) under the Exchange Act requires that FICC establish, implement, maintain and enforce written policies and procedures reasonably designed to effectively identify, measure, monitor, and manage its credit exposures to participants and those arising from its payment, clearing, and settlement processes, including by maintaining sufficient financial resources to cover its credit exposure to each participant fully with a high degree of confidence.[42] As described above, FICC proposes to enhance its capital requirements for members, redefine the Watch List, and eliminate the enhanced surveillance list. FICC believes that enhancing its capital requirements for members would help ensure that members maintain sufficient capital to absorb losses arising out of their clearance and settlement activities at FICC and otherwise, which would in turn help FICC more effectively manage and mitigate its credit exposures to its members and thereby help enhance the ability of FICC's financial resources to cover fully FICC's credit exposures to members with a high degree of confidence. FICC believes that redefining the Watch List and eliminating the enhanced surveillance list would help FICC better allocate its resources for monitoring its credit exposures to members. By helping to better allocate resources, the proposal would in turn help FICC more effectively manage and mitigate its credit exposures to its members, thereby helping to enhance the ability of FICC's financial resources to cover fully FICC's credit exposures to members with a high degree of confidence. Therefore, FICC believes that its proposal to enhance its capital requirements for members, redefine the Watch List, and eliminate the enhanced surveillance list is consistent with Rule 17Ad–22(e)(4)(i) under the Exchange Act.

Rule 17Ad–22(e)(18) under the Exchange Act requires that FICC establish, implement, maintain and enforce written policies and procedures reasonably designed to establish objective, risk-based, and publicly disclosed criteria for participation, which permit fair and open access by direct and, where relevant, indirect participants and other financial market utilities, require participants to have sufficient financial resources and robust operational capacity to meet obligations arising from participation in the clearing agency, and monitor compliance with such participation requirements on an ongoing basis.[43] As described above, FICC proposes to enhance its capital requirements for members, redefine the Watch List, and eliminate the enhanced surveillance list. FICC's proposed capital requirements would utilize objective measurements of member capital that would be fully disclosed in the Rules. The proposed capital requirements also would be risk-based and allow for fair and open access in that they would be based on the credit risks imposed by the member, such as its membership type and type of entity (including whether it is a non-U.S. entity). Accordingly, FICC's proposed capital requirements would establish objective, risk-based and publicly disclosed criteria for membership, which would permit fair and open access by members. The proposed capital requirements also would ensure that members maintain sufficient capital to absorb losses arising out of their clearance and settlement activities at FICC and otherwise, which would help ensure that they have sufficient financial resources to meet the obligations arising from their membership at FICC. FICC's proposed redefinition of the Watch List and the elimination of the enhanced surveillance list would help FICC better allocate its resources for monitoring the credit risks posed by its members, including their ongoing compliance with FICC's proposed enhancements to its capital requirements. Therefore, FICC believes that its proposal to enhance its capital requirements for members, redefine the Watch List, and eliminate the enhanced surveillance list is consistent with Rule 17Ad–22(e)(18) under the Exchange Act.

(B) Clearing Agency's Statement on Burden on Competition

FICC does not believe the proposed changes to enhance its capital requirements for members would have an impact on competition because all of its members already meet, and in most cases exceed, the proposed capital requirements.

Additionally, FICC does not believe that the proposed changes to (i) redefine the Watch List and eliminate the enhanced surveillance list and (ii) make clarification changes to the Rules would impact competition. Redefining the Watch List and eliminating the enhanced surveillance list are simply intended to streamline and clarify these monitoring practices. If anything, by no longer automatically including members with a CRRM rating of 5 on the Watch List, as proposed, the change could promote competition for such members, as such members would no longer automatically be subject to increased scrutiny by FICC, including the possibility of increased financial and reporting obligations. Meanwhile, making clarification changes to the Rules to ensure that they remain accessible and transparent would help facilitate members' understanding of the Rules and provide members with increased predictability and certainty regarding their rights and obligations with respect to FICC's clearance and settlement activities.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

FICC has not received or solicited any written comments relating to this proposal. If any written comments are received, FICC will amend this filing to publicly file such comments as an Exhibit 2 to this filing, as required by Form 19b–4 and the General Instructions thereto.

Persons submitting comments are cautioned that, according to Section IV (Solicitation of Comments) of the Exhibit 1A in the General Instructions to Form 19b–4, the SEC does not edit personal identifying information from comment submissions. Commenters should submit only information that they wish to make available publicly, including their name, email address, and any other identifying information.

All prospective commenters should follow the SEC's instructions on *How to Submit Comments,* available at *https://*

[42] 17 CFR 240.17Ad–22(e)(4)(i).

[43] 17 CFR 240.17Ad–22(e)(18).

www.sec.gov/regulatory-actions/how-to-submit-comments. General questions regarding the rule filing process or logistical questions regarding this filing should be directed to the Main Office of the SEC's Division of Trading and Markets at *tradingandmarkets@sec.gov* or 202–551–5777.

FICC reserves the right to not respond to any comments received.

III. Date of Effectiveness of the Proposed Rule Change, and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Exchange Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–FICC–2021–009 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR–FICC–2021–009. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of FICC and on DTCC's website (*http://dtcc.com/legal/sec-rule-filings.aspx*). All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FICC–2021–009 and should be submitted on or before January 19, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[44]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–28251 Filed 12–28–21; 8:45 am]

BILLING CODE 8011–01–P

[44] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93864; File No. SR–ICEEU–2021–025]

Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendments to the ICE Clear Europe Delivery Procedures

December 23, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 16, 2021, ICE Clear Europe Limited (''ICE Clear Europe'' or the ''Clearing House'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule changes described in Items I, II and III below, which Items have been prepared primarily by ICE Clear Europe. ICE Clear Europe filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(4)(ii) thereunder,[4] such that the proposed rule change was immediately effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The principal purpose of the proposed amendments is for ICE Clear Europe to amend its Delivery Procedures (''Delivery Procedures'' or ''Procedures'') to add a new Part HH thereto (''Part HH'') to address new ICE Endex French PEG Natural Gas Futures and ICE Endex French PEG Natural Gas Daily Futures (each a ''Contract'' and together the ''Contracts''), natural gas futures contracts that will be traded on ICE Endex and cleared by ICE Clear Europe. The proposed updates would also make certain conforming changes elsewhere in the Delivery Procedures.[5]

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ICE Clear Europe included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. ICE Clear Europe has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) Purpose

ICE Clear Europe is proposing to add a new Part HH as well as make certain conforming changes elsewhere in the Delivery Procedures. Part HH would apply to the Contracts, which are to be traded on ICE Endex and cleared at ICE Clear Europe. The amended Delivery Procedures would provide the delivery specifications and processes related to delivery under such Contracts.

Delivery under the Contracts would be settled by the transfer of rights to Natural Gas at the PEG (the title transfer point in the Transmission System where the Licensed Shipper would exchange daily quantities of energy with other shippers or with one of the operators of the Transmission System in France) from a Transferor nominated by the Seller to the Clearing House and the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(4)(ii).

[5] Capitalized terms used but not defined herein have the meanings specified in the Delivery Procedures or, if not defined therein, the ICE Clear Europe Clearing Rules.

[sic] from the Clearing House to a Transferee nominated by the Buyer. The amendments would provide that the Clearing Members grant authority to ICE Clear Europe to make Trade Nominations on their behalf in connection with deliveries under Contracts. Clearing Members would not be required to send Trade Nominations themselves. Clearing Members would also acknowledge that GRTgaz (one of the operators of the Transmission System in France) may take into consideration the Trade Nominations made by the Clearing House, and ignore Trade Nominations sent by Buyers, Sellers, Transferors and Transferees.

The amendments would further specify certain details of the delivery process for the Contracts including denominations of relevant quantity, settlement price, relevant time zones, timing of cessation of trading and certain requirements for exchange of futures for physical and swap transactions under exchange rules.

The amendments would also address the responsibilities of the Clearing House and relevant parties for delivery under Contracts, as well as certain limitations of liability for the Clearing House. Specifically, the Clearing House would not be responsible for the performance or non-performance of GRTgaz, including of its obligations under the GRTgaz Rules. Additionally, neither the Buyer, Seller nor their Transferees or Transferors would have any claim against the Clearing House for any loss, damage, cost or expense incurred as a result of (i) any actions taken by the Clearing House pursuant to the GRTgaz Rules, or (ii) technical issues, technical measures, authorisations, limitations, prohibitions, or failures imposed on, the condition or operation of, or the performance or non-performance of the Transmission System, GRTgaz and the TRANS@actions Platform ties except as expressly provided in the ICE Endex Rules. Each of the Buyer, Seller and their Transferees or Transferors would be required to accept any consequences arising from Trade Nominations made by the Clearing House pursuant to Part HH.

The amendments would provide details related to delivery contact [sic] security, which is the delivery margin to be provided by Buyer and Seller, and which would take into account the possibility of costs or charges arising from the balancing regime under the GRTgaz Rules. The Clearing House would be permitted to alter the calculation of each of the Buyer's Security and the Seller's Security at any time or make adjustments in respect of a specific Seller or Buyer.

The amendments would include delivery timetables with detailed timeframes and descriptions of the delivery processes for delivery under Contracts, and such timetables would detail, among other processes, the time for cessation of trading, provision of Buyer's and Seller's Security, submission of delivery intentions, confirmations of intent to deliver or receive, nominations of parties to delivery [sic] or receive, delivery confirmations, invoicing, release of delivery margin and sales proceeds following completion of delivery, and other matters. The amendments would also include delivery tables with detailed times and processes relating to failed delivery under Contracts. In respect of invoicing, the amendments would detail how amounts included in invoices prepared by the Clearing House would be calculated for confirmed deliveries and failed deliveries of each Contract.

In addition, the amendments would detail the reports produced by the Clearing House in respect of each Contract and made available to Buyers and Sellers electronically.

The amendments would also update Section 5.1 of the Delivery Procedures to include ICE Endex French PEG Natural Gas Futures Contracts and ICE Endex French PEG Natural Gas Daily Futures Contracts in the list of contracts under which, subject to delivery obligations, sellers and buyers can nominate transferors and transferees.

Statutory Basis

ICE Clear Europe believes that the proposed amendments to the Delivery Procedures are consistent with the requirements of Section 17A of the Act [6] and the regulations thereunder applicable to it. In particular, Section 17A(b)(3)(F) of the Act [7] requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions, the safeguarding of securities and funds in the custody or control of the clearing agency or for which it is responsible, and the protection of investors and the public interest. The proposed changes to the Delivery Procedures are designed to establish delivery procedures relating to ICE ENDEX French PEG Natural Gas Futures Contracts and ICE Endex French PEG Natural Gas Daily Futures Contracts, which will be traded on ICE Endex and cleared at ICE Clear Europe. The amendments would set out the role, responsibilities and liabilities of the Clearing House, Clearing Members and designated transferors and transferees in the physical delivery process, in line with Delivery Procedures for other types of deliverable energy futures contracts. Contracts providing for delivery under Part HH will be cleared by the Clearing House in the substantially same manner as other types of deliverable energy futures contracts, and will be supported by ICE Clear Europe's existing F&O financial resources, risk management, systems and operational arrangements. Accordingly, ICE Clear Europe believes that its financial resources, risk management, systems and operational arrangements are sufficient to support clearing of such contracts and to manage the risks associated with such contracts. As a result, in ICE Clear Europe's view, the amendments would be consistent with the prompt and accurate clearance and settlement of the contracts, and the protection of investors and the public interest consistent with the requirements of Section 17A(b)(3)(F) of the Act.[8] (In ICE Clear Europe's view, the amendments would not affect the safeguarding of funds or securities in the custody or control of the clearing agency or for which it is responsible, within the meaning of Section 17A(b)(3)(F)).[9]

In addition, Rule 17Ad–22(e)(10) [10] provides that ''[e]ach covered clearing agency shall establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable [. . .] establish and maintain transparent written standards that state its obligations with respect to the delivery of physical instruments, and establish and maintain operational practices that identify, monitor and manage the risks associated with such physical deliveries.'' As discussed above, the amendments would establish a new set of procedures applicable to the delivery and settlement of ICE ENDEX French PEG Natural Gas Futures Contracts and ICE Endex French PEG Natural Gas Daily Futures Contracts. The procedures would address, among other matters, delivery specifications for such contracts, the obligations and roles of Clearing Members and the Clearing House, certain limitations of liability for the Clearing House, and certain other documentation and timing matters, consistent with the requirements of the Clearing House. Clearance of the

[6] 15 U.S.C. 78q–1.

[7] 15 U.S.C. 78q–1(b)(3)(F).

[8] 15 U.S.C. 78q–1(b)(3)(F).

[9] 15 U.S.C. 78q–1(b)(3)(F).

[10] 17 CFR 240.17Ad–22(e)(10).

Contracts would otherwise be supported by ICE Clear Europe's existing financial resources, risk management, systems and operational arrangements. The amendments thus appropriately clarify the role and responsibilities of the Clearing House and Clearing Members with respect to physical delivery. As a result, ICE Clear Europe believes the amendments are consistent with the requirements of Rule 17Ad–22(e)(10).[11]

(B) Clearing Agency's Statement on Burden on Competition

ICE Clear Europe does not believe the proposed amendments would have any impact, or impose any burden, on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed amendments to the Delivery Procedures are intended to establish a new set of procedures applicable to the delivery and settlement of ICE ENDEX French PEG Natural Gas Futures Contracts and ICE Endex French PEG Natural Gas Daily Futures Contracts in connection with the listing of such contracts for trading on the ICE Endex market. ICE Clear Europe believes that such contracts would provide opportunities for interested market participants to engage in trading activity in the relevant French natural gas market. ICE Clear Europe does not believe the amendments would adversely affect competition among Clearing Members, materially affect the cost of clearing, adversely affect access to clearing for Clearing Members or their customers, or otherwise adversely affect competition in clearing services. Accordingly, ICE Clear Europe does not believe that the amendments would impose any impact or burden on competition that is not appropriate in furtherance of the purpose of the Act.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments relating to the proposed amendments have not been solicited or received by ICE Clear Europe. ICE Clear Europe will notify the Commission of any comments received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[12] and paragraph (f) of Rule 19b–4[13] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*https://www.sec.gov/rules/sro.shtml*) or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–ICEEU–2021–025 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–ICEEU–2021–025. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings will also be available for inspection and copying at the principal office of ICE Clear Europe and on ICE Clear Europe's website at *https://www.theice.com/clear-europe/regulation.* All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ICEEU–2021–025 and should be submitted on or before January 19, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2021–28328 Filed 12–28–21; 8:45 am]

BILLING CODE 8011–01–P

[11] 17 CFR 240.17Ad–22(e)(10).

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 34452; File No. 812–15265]

Variant Alternative Income Fund, et al.

December 23, 2021.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice.

Notice of application for an order under sections 17(d) and 57(i) of the Investment Company Act of 1940 (the ''Act'') and rule 17d–1 under the Act to permit certain joint transactions otherwise prohibited by sections 17(d) and 57(a)(4) of the Act and rule 17d–1 under the Act.

SUMMARY OF APPLICATION: Applicants request an order to permit certain closed-end management investment companies to co-invest in portfolio companies with each other and with affiliated investment funds and accounts.

APPLICANTS: Variant Alternative Income Fund (the ''VAIF''), Variant Impact Fund (''VIF'' and together with VAIF, the ''Existing Regulated Funds''), Variant Investments, LLC (''Variant'')

FILING DATES: The application was filed on September 21, 2021 and amended on December 22, 2021.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by emailing the Commission's Secretary at *Secretarys-Office@sec.gov* and serving applicants with a copy of the request, by email. Hearing requests should be received by the Commission by 5:30 p.m. on January 18, 2022, and should be accompanied by proof of service on the applicants, in the form of an affidavit, or for lawyers,

a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary at *Secretarys-Office@sec.gov.*

ADDRESSES: The Commission: *Secretarys-Office@sec.gov.* Applicants: Attn: Joshua B. Deringer, Esq., *joshua.deringer@faegredrinker.com;* Curtis Fintel, *operations@variantinvestments.com.*

FOR FURTHER INFORMATION CONTACT: Toyin Momoh, Senior Counsel, at (202) 551–3775 or Trace Rakestraw, Branch Chief, at (202) 551–6821 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Introduction:

1. The Applicants request an order of the Commission under sections 17(d) and 57(i) and rule 17d–1 thereunder (the ''Order'') to permit, subject to the terms and conditions set forth in the application (the ''Conditions''), a Regulated Fund [1] and one or more other Regulated Funds and/or one or more Affiliated Funds [2] to enter into Co-Investment Transactions with each other. ''Co-Investment Transaction'' means any transaction in which one or more Regulated Funds (or its Wholly-Owned Investment Sub (defined below)) participated together with one or more Affiliated Funds and/or one or more other Regulated Funds in reliance on the Order. ''Potential Co-Investment Transaction'' means any investment opportunity in which a Regulated Fund (or its Wholly-Owned Investment Sub) could not participate together with one or more Affiliated Funds and/or one or more other Regulated Funds without obtaining and relying on the Order.[3]

Applicants

2. VAIF was organized under the Delaware Statutory Trust Act and is a non-diversified, closed-end management investment company registered under the Act. VAIF's Board [4] will be comprised of a majority of members who are Independent Trustees.[5]

3. VIF was organized under the Delaware Statutory Trust Act and is a non-diversified, closed-end management investment company registered under the Act. VIF's Board will be comprised of a majority of members who are Independent Trustees.

4. Variant, an Oregon limited liability company that is registered under the Advisers Act, serves as the investment adviser to each of the Existing Regulated Funds and either it or another will serve as the investment adviser to any Future Regulated Fund or Future Affiliated Fund.

5. Variant Proprietary Accounts will hold various financial assets in a principal capacity. Variant and its affiliates may operate through wholly- or majority-owned subsidiaries. Currently, there are no Variant Proprietary Accounts or subsidiaries that exist and currently intend to participate in the co-investment program.

6. Applicants state that a Regulated Fund may, from time to time, form one or more Wholly-Owned Investment Subs.[6] Such a subsidiary may be prohibited from investing in a Co-Investment Transaction with a Regulated Fund (other than its parent) or any Affiliated Fund because it would be a company controlled by its parent Regulated Fund for purposes of section 57(a)(4) and rule 17d–1. Applicants request that each Wholly-Owned Investment Sub be permitted to participate in Co-Investment Transactions in lieu of the Regulated Fund that owns it and that the Wholly-Owned Investment Sub's participation in any such transaction be treated, for purposes of the Order, as though the parent Regulated Fund were participating directly.

Applicants' Representations

A. Allocation Process

7. Applicants state that the Adviser is presented with a substantial number of investment opportunities each year on behalf of its clients, and that the Adviser must determine how to allocate those opportunities in a manner that, over time, is fair and equitable to all of its clients. Such investment opportunities may be Potential Co-Investment Transactions.

8. Applicants represent that the Adviser has established processes for allocating initial investment opportunities, opportunities for subsequent investment in an issuer and dispositions of securities holdings reasonably designed to treat all clients fairly and equitably. Further, Applicants represent that these processes will be extended and modified in a manner reasonably designed to ensure that the additional transactions permitted under the Order will both (i) be fair and equitable to the Regulated Funds and Affiliated Funds and (ii) comply with the Conditions. In particular, consistent

[1] ''Regulated Funds'' means the Existing Regulated Funds and any Future Regulated Funds. ''Future Regulated Fund'' means a closed-end management investment company (a) that is registered under the Act or has elected to be regulated as a business development company (''BDC''); (b) whose investment adviser is an Adviser; and (c) that intends to participate in the co-investment program. ''Adviser'' means Variant and any other investment adviser that is (i) controlling, under common control with, or controlled by Variant, (ii) registered as an investment adviser under the Investment Advisers Act of 1940 (the ''Advisers Act''), and (iii) not a Regulated Fund or a subsidiary of a Regulated Fund. Section 2(a)(48) defines a BDC to be any closed-end investment company that operates for the purpose of making investments in securities described in section 55(a)(1) through 55(a)(3) and makes available significant managerial assistance with respect to the issuers of such securities.

[2] ''Affiliated Fund'' means any Future Affiliated Fund or any Variant Proprietary Account. ''Future Affiliated Fund'' means any entity (a) whose investment adviser is an Adviser; (b) that would be an investment company but for section 3(c)(1), 3(c)(5)(C) or 3(c)(7) of the Act; and (c) that intends to participate in the co-investment program. ''Variant Proprietary Account'' means any account of an Adviser or its affiliates or any company that is a direct or indirect, wholly- or majority-owned subsidiary of the Adviser or its affiliates, which, from time to time, may hold various financial assets in a principal capacity.

[3] All existing entities that currently intend to rely on the Order have been named as applicants and any existing or future entities that may rely on the Order in the future will comply with the terms and conditions of the application.

[4] ''Board'' means the board of trustees (or the equivalent) of a Regulated Fund.

[5] ''Independent Trustee'' means a member of the Board of any relevant entity who is not an ''interested person'' as defined in section 2(a)(19) of the Act. No Independent Trustee of a Regulated Fund will have a direct or indirect financial interest in any Co-Investment Transaction or any interest in any portfolio company, other than indirectly through share ownership in one of the Regulated Funds.

[6] ''Wholly-Owned Investment Sub'' means an entity (i) that is wholly-owned by a Regulated Fund (with such Regulated Fund at all times holding, beneficially and of record, 100% of the voting and economic interests); (ii) whose sole business purpose is to hold one or more investments on behalf of such Regulated Fund (and, in the case of a SBIC Subsidiary (defined below), maintain a license under the SBA Act (defined below) and issue debentures guaranteed by the SBA (defined below)); (iii) with respect to which such Regulated Fund's Board has the sole authority to make all determinations with respect to the entity's participation under the Conditions; and (iv) that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act. ''SBIC Subsidiary'' means a Wholly-Owned Investment Sub that is licensed by the Small Business Administration (the ''SBA'') to operate under the Small Business Investment Act of 1958, as amended, (the ''SBA Act'') as a small business investment company.

with Condition 1, if a Potential Co-Investment Transaction falls within the then-current Objectives and Strategies [7] and any Board-Established Criteria [8] of a Regulated Fund, the policies and procedures will require that the Adviser to such Regulated Fund receives sufficient information to allow such Adviser's investment committee to make its independent determination and recommendations under the Conditions.

9. The Adviser to each applicable Regulated Fund will then make an independent determination of the appropriateness of the investment for the Regulated Fund in light of the Regulated Fund's then-current circumstances. If the Adviser to a Regulated Fund deems the Regulated Fund's participation in such Potential Co-Investment Transaction to be appropriate, then it will formulate a recommendation regarding the proposed order amount for the Regulated Fund.

10. Applicants state that, for each Regulated Fund and Affiliated Fund whose Adviser recommends participating in a Potential Co-Investment Transaction, the Adviser will submit a proposed order amount to an internal investment committee which the Adviser will establish to handle the allocation of investment opportunities in Potential Co-Investment Transactions. Applicants state further that, at this stage, each proposed order amount may be reviewed and adjusted, in accordance with the Adviser's written allocation policies and procedures, by the Adviser's investment committee.[9] The order of a Regulated Fund or Affiliated Fund resulting from this process is referred to as its ''Internal Order.'' The Internal Order will be submitted for approval by the Required Majority of any participating Regulated Funds in accordance with the Conditions.[10]

11. If the aggregate Internal Orders for a Potential Co-Investment Transaction do not exceed the size of the investment opportunity immediately prior to the submission of the orders to the underwriter, broker, dealer or issuer, as applicable (the ''External Submission''), then each Internal Order will be fulfilled as placed. If, on the other hand, the aggregate Internal Orders for a Potential Co-Investment Transaction exceed the size of the investment opportunity immediately prior to the External Submission, then the allocation of the opportunity will be made pro rata on the basis of the size of the Internal Orders.[11] If, subsequent to such External Submission, the size of the opportunity is increased or decreased, or if the terms of such opportunity, or the facts and circumstances applicable to the Regulated Funds' or the Affiliated Funds' consideration of the opportunity, change, the participants will be permitted to submit revised Internal Orders in accordance with written allocation policies and procedures that an Adviser will establish, implement and maintain. The Board of the Regulated Fund will then either approve or disapprove of the investment opportunity in accordance with condition 2, 6, 7, 8 or 9, as applicable.

B. Follow-On Investments

12. Applicants state that from time to time the Regulated Funds and Affiliated Funds may have opportunities to make Follow-On Investments [12] in an issuer in which a Regulated Fund and one or more other Regulated Funds and/or Affiliated Funds previously have invested.

13. Applicants propose that Follow-On Investments would be divided into two categories depending on whether the prior investment was a Co-Investment Transaction or a Pre-Boarding Investment.[13] If the Regulated Funds and Affiliated Funds had previously participated in a Co-Investment Transaction with respect to the issuer, then the terms and approval of the Follow-On Investment would be subject to the Standard Review Follow-Ons described in Condition 8. If the Regulated Funds and Affiliated Funds have not previously participated in a Co-Investment Transaction with respect to the issuer but hold a Pre-Boarding Investment, then the terms and approval of the Follow-On Investment would be subject to the Enhanced-Review Follow-Ons described in Condition 9. All Enhanced Review Follow-Ons require the approval of the Required Majority. For a given issuer, the participating Regulated Funds and Affiliated Funds would need to comply with the requirements of Enhanced-Review Follow-Ons only for the first Co-Investment Transaction. Subsequent Co-Investment Transactions with respect to the issuer would be governed by the requirements of Standard Review Follow-Ons.

14. A Regulated Fund would be permitted to invest in Standard Review Follow-Ons either with the approval of the Required Majority under Condition 8(c) or without Board approval under Condition 8(b) if it is (i) a Pro Rata Follow-On Investment [14] or (ii) a Non-

[7] ''Objectives and Strategies'' means with respect to any Regulated Fund, its investment objectives and strategies, as described in its most current registration statement on Form N–2, other current filings with the Commission under the Securities Act of 1933 (the ''Securities Act'') or under the Securities Exchange Act of 1934, as amended, and its most current report to stockholders.

[8] ''Board-Established Criteria'' means criteria that the Board of a Regulated Fund may establish from time to time to describe the characteristics of Potential Co-Investment Transactions regarding which the Adviser to the Regulated Fund should be notified under Condition 1. The Board-Established Criteria will be consistent with the Regulated Fund's Objectives and Strategies. If no Board-Established Criteria are in effect, then the Regulated Fund's Adviser will be notified of all Potential Co-Investment Transactions that fall within the Regulated Fund's then-current Objectives and Strategies. Board-Established Criteria will be objective and testable, meaning that they will be based on observable information, such as industry/sector of the issuer, minimum EBITDA of the issuer, asset class of the investment opportunity or required commitment size, and not on characteristics that involve a discretionary assessment. The Adviser to the Regulated Fund may from time to time recommend criteria for the Board's consideration, but Board-Established Criteria will only become effective if approved by a majority of the Independent Trustees. The Independent Trustees of a Regulated Fund may at any time rescind, suspend or qualify its approval of any Board-Established Criteria, though applicants anticipate that, under normal circumstances, the Board would not modify these criteria more often than quarterly.

[9] The reason for any such adjustment to a proposed order amount will be documented in writing and preserved in the records of the Adviser.

[10] ''Required Majority'' means a required majority, as defined in section 57(o) of the Act. In the case of a Regulated Fund that is a registered closed-end fund, the Board members that make up the Required Majority will be determined as if the Regulated Fund were a BDC subject to section 57(o).

[11] Each Adviser will maintain records of all proposed order amounts, Internal Orders and External Submissions in conjunction with Potential Co-Investment Transactions. Each applicable Adviser will provide the Eligible Trustees with information concerning the Affiliated Fund's and Regulated Funds' order sizes to assist the Eligible Trustees with their review of the applicable Regulated Fund's investments for compliance with the Conditions. ''Eligible Trustees'' means, with respect to a Regulated Fund and a Potential Co-Investment Transaction, the members of the Regulated Fund's Board eligible to vote on that Potential Co-Investment Transaction under section 57(o) of the Act (treating any registered investment company or series thereof as a BDC for this purpose).

[12] ''Follow-On Investment'' means an additional investment in the same issuer, including, but not limited to, through the exercise of warrants, conversion privileges or other rights to purchase securities of the issuer.

[13] ''Pre-Boarding Investments'' are investments in an issuer held by a Regulated Fund as well as one or more Affiliated Funds and/or one or more other Regulated Funds that were acquired prior to participating in any Co-Investment Transaction in transactions: (i) In which the only term negotiated by or on behalf of such funds was price in reliance on one of the JT No-Action Letters (defined below); or (ii) occurring at least 90 days apart and without coordination between the Regulated Fund and any Affiliated Fund or other Regulated Fund.

[14] A ''Pro Rata Follow-On Investment'' is a Follow-On Investment (i) in which the participation of each Affiliated Fund and each Regulated Fund is proportionate to its outstanding investments in the issuer or security, as appropriate, immediately

Continued

Negotiated Follow-On Investment.[15] Applicants believe that these Pro Rata and Non-Negotiated Follow-On Investments do not present a significant opportunity for overreaching on the part of any Adviser and thus do not warrant the time or the attention of the Board. Pro Rata Follow-On Investments and Non-Negotiated Follow-On Investments remain subject to the Board's periodic review in accordance with Condition 10.

C. Dispositions

15. Applicants propose that Dispositions[16] would be divided into two categories. If the Regulated Funds and the Affiliated Funds holding investments in the issuer had previously participated in a Co-Investment Transaction with respect to the issuer, then the terms and approval of the Disposition would be subject to the Standard Review Dispositions described in Condition 6. If the Regulated Funds and Affiliated Funds have not previously participated in a Co-Investment Transaction with respect to the issuer but hold a Pre-Boarding Investment, then the terms and approval of the Disposition would be subject to the Enhanced Review Dispositions described in Condition 7. Subsequent Dispositions with respect to the same issuer would be governed by Condition 6 under the Standard Review Dispositions.[17]

16. A Regulated Fund may participate in a Standard Review Disposition either with the approval of the Required Majority under Condition 6(d) or without Board approval under Condition 6(c) if (i) the Disposition is a Pro Rata Disposition[18] or (ii) the securities are Tradable Securities[19] and the Disposition meets the other requirements of Condition 6(c)(ii). Pro Rata Dispositions and Dispositions of a Tradable Security remain subject to the Board's periodic review in accordance with Condition 10.

D. Delayed Settlement

17. Applicants represent that under the terms and Conditions of the application, all Regulated Funds and Affiliated Funds participating in a Co-Investment Transaction will invest at the same time, for the same price and with the same terms, conditions, class, registration rights and any other rights, so that none of them receives terms more favorable than any other. However, the settlement date for an Affiliated Fund in a Co-Investment Transaction may occur up to ten business days after the settlement date for the Regulated Fund, and vice versa. Nevertheless, in all cases, (i) the date on which the commitment of the Affiliated Funds and Regulated Funds is made will be the same even where the settlement date is not and (ii) the earliest settlement date and the latest settlement date of any Affiliated Fund or Regulated Fund participating in the transaction will occur within ten business days of each other.

E. Holders

18. Under Condition 15, if an Adviser, its principals, or any person controlling, controlled by, or under common control with the Adviser or its principals, and the Affiliated Funds (collectively, the ''Holders'') own in the aggregate more than 25 percent of the outstanding voting shares of a Regulated Fund (the ''Shares''), then the Holders will vote such Shares in the same percentages as the Regulated Fund's other shareholders (not including the Holders) when voting on matters specified in the Condition.

Applicants' Legal Analysis

1. Section 17(d) of the Act and rule 17d–1 under the Act prohibit participation by a registered investment company and an affiliated person in any ''joint enterprise or other joint arrangement or profit-sharing plan,'' as defined in the rule, without prior approval by the Commission by order upon application. Section 17(d) of the Act and rule 17d–1 under the Act are applicable to Regulated Funds that are registered closed-end investment companies.

2. Similarly, with regard to BDCs, section 57(a)(4) of the Act generally prohibits certain persons specified in section 57(b) from participating in joint transactions with the BDC or a company controlled by the BDC in contravention of rules as prescribed by the Commission. Section 57(i) of the Act provides that, until the Commission prescribes rules under section 57(a)(4), the Commission's rules under section 17(d) of the Act applicable to registered closed-end investment companies will be deemed to apply to transactions subject to section 57(a)(4). Because the Commission has not adopted any rules under section 57(a)(4), rule 17d–1 also applies to joint transactions with Regulated Funds that are BDCs.

3. Co-Investment Transactions are prohibited by either or both of rule 17d–1 and section 57(a)(4) without a prior exemptive order of the Commission to the extent that the Affiliated Funds and the Regulated Funds participating in such transactions fall within the category of persons described by rule 17d–1 and/or section 57(b), as applicable, vis-à-vis each participating Regulated Fund. Each of the participating Regulated Funds and Affiliated Funds may be deemed to be affiliated persons vis-à-vis a Regulated

preceding the Follow-On Investment, and (ii) in the case of a Regulated Fund, a majority of the Board has approved the Regulated Fund's participation in the pro rata Follow-On Investments as being in the best interests of the Regulated Fund. The Regulated Fund's Board may refuse to approve, or at any time rescind, suspend or qualify, its approval of Pro Rata Follow-On Investments, in which case all subsequent Follow-On Investments will be submitted to the Regulated Fund's Eligible Trustees in accordance with Condition 8(c).

[15] A ''Non-Negotiated Follow-On Investment'' is a Follow-On Investment in which a Regulated Fund participates together with one or more Affiliated Funds and/or one or more other Regulated Funds (i) in which the only term negotiated by or on behalf of the funds is price and (ii) with respect to which, if the transaction were considered on its own, the funds would be entitled to rely on one of the JT No-Action Letters. ''JT No-Action Letters'' means SMC Capital, Inc., SEC No-Action Letter (pub. avail. Sept. 5, 1995) and Massachusetts Mutual Life Insurance Company, SEC No-Action Letter (pub. avail. June 7, 2000).

[16] ''Disposition'' means the sale, exchange or other disposition of an interest in a security of an issuer.

[17] However, with respect to an issuer, if a Regulated Fund's first Co-Investment Transaction is an Enhanced Review Disposition, and the Regulated Fund does not dispose of its entire position in the Enhanced Review Disposition, then before such Regulated Fund may complete its first Standard Review Follow-On in such issuer, the Eligible Trustees must review the proposed Follow-On Investment not only on a stand-alone basis but also in relation to the total economic exposure in such issuer (*i.e.,* in combination with the portion of the Pre-Boarding Investment not disposed of in the Enhanced Review Disposition), and the other terms of the investments. This additional review would be required because such findings would not have been required in connection with the prior Enhanced Review Disposition, but they would have been required had the first Co-Investment Transaction been an Enhanced Review Follow-On.

[18] A ''Pro Rata Disposition'' is a Disposition (i) in which the participation of each Affiliated Fund and each Regulated Fund is proportionate to its outstanding investment in the security subject to Disposition immediately preceding the Disposition; and (ii) in the case of a Regulated Fund, a majority of the Board has approved the Regulated Fund's participation in pro rata Dispositions as being in the best interests of the Regulated Fund. The Regulated Fund's Board may refuse to approve, or at any time rescind, suspend or qualify, its approval of Pro Rata Dispositions, in which case all subsequent Dispositions will be submitted to the Regulated Fund's Eligible Trustees.

[19] ''Tradable Security'' means a security that meets the following criteria at the time of Disposition: (i) It trades on a national securities exchange or designated offshore securities market as defined in rule 902(b) under the Securities Act; (ii) it is not subject to restrictive agreements with the issuer or other security holders; and (iii) it trades with sufficient volume and liquidity (findings as to which are documented by the Adviser to any Regulated Funds holding investments in the issuer and retained for the life of the Regulated Fund) to allow each Regulated Fund to dispose of its entire position remaining after the proposed Disposition within a short period of time not exceeding 30 days at approximately the value (as defined by section 2(a)(41) of the Act) at which the Regulated Fund has valued the investment.

Fund within the meaning of section 2(a)(3) by reason of common control because (i) Variant is the investment adviser to, and may be deemed to control, each of the Existing Regulated Funds and an Adviser to the Regulated Funds will be the investment adviser to, and may be deemed to control, any Future Regulated Fund; (ii) any Affiliated Fund will be managed by, and may be deemed to be controlled by, an Adviser to Affiliated Funds; and (iii) an Adviser to Affiliated Funds and an Adviser to Regulated Funds are under common control. Thus, each Regulated Fund would be related to each other in a manner described by 57(b) or rule 17d–1, as applicable, and thus prohibited from participating in Co-Investment Transactions with each other. Each of the Affiliated Funds could also be deemed to be a person related to the Regulated Funds in a manner described by section 57(b) and related to the other Regulated Funds in a manner described by rule 17d–1; and therefore the prohibitions of rule 17d–1 and section 57(a)(4) would apply respectively to prohibit the Affiliated Funds from participating in Co-Investment Transactions with the Regulated Funds.

4. Because the Variant Proprietary Accounts will be controlled by the Adviser or its affiliates and, therefore, may be under common control with the Existing Regulated Funds, any future Adviser, and any Future Regulated Funds, the Variant Proprietary Accounts could be deemed to be persons related to the Regulated Funds (or a company controlled by the Regulated Funds) in a manner described by section 17(d) or section 57(b) and also prohibited from participating in the co-investment program.

5. In passing upon applications under rule 17d–1, the Commission considers whether a company's participation in the joint transaction is consistent with the provisions, policies, and purposes of the Act and the extent to which such participation is on a basis different from or less advantageous than that of other participants.

6. Applicants state that in the absence of the requested relief, in many circumstances the Regulated Funds would be limited in their ability to participate in attractive and appropriate investment opportunities. Applicants state that, as required by rule 17d–1(b), the Conditions ensure that the terms on which Co-Investment Transactions may be made will be consistent with the participation of the Regulated Funds being on a basis that it is neither different from nor less advantageous than other participants, thus protecting the equity holders of any participant from being disadvantaged. Applicants further state that the Conditions ensure that all Co-Investment Transactions are reasonable and fair to the Regulated Funds and their shareholders and do not involve overreaching by any person concerned, including the Adviser. Applicants state that the Regulated Funds' participation in the Co-Investment Transactions in accordance with the Conditions will be consistent with the provisions, policies, and purposes of the Act and would be done in a manner that is not different from, or less advantageous than, that of other participants.

Applicants' Conditions

Applicants agree that the Order will be subject to the following conditions:

1. *Identification and Referral of Potential Co-Investment Transactions.*

(a) Each Adviser will establish, maintain and implement policies and procedures reasonably designed to ensure that the Adviser is promptly notified of all Potential Co-Investment Transactions that fall within the then-current Objectives and Strategies and Board-Established Criteria of any Regulated Fund the Adviser manages.

(b) When an Adviser to a Regulated Fund is notified of a Potential Co-Investment Transaction under Condition 1(a), the Adviser will make an independent determination of the appropriateness of the investment for the Regulated Fund in light of the Regulated Fund's then-current circumstances.

2. *Board Approvals of Co-Investment Transactions.*

(a) If an Adviser deems a Regulated Fund's participation in any Potential Co-Investment Transaction to be appropriate for the Regulated Fund, it will then determine an appropriate level of investment for the Regulated Fund.

(b) If the aggregate amount recommended by an Adviser to be invested in the Potential Co-Investment Transaction by the participating Regulated Funds and any participating Affiliated Funds, collectively, exceeds the amount of the investment opportunity, the investment opportunity will be allocated among them pro rata based on the size of the Internal Orders, as described in Section III.A.1.b. of the application. Each Adviser to a participating Regulated Fund will promptly notify and provide the Eligible Trustees with information concerning the Affiliated Funds' and Regulated Funds' order sizes to assist the Eligible Trustees with their review of the applicable Regulated Fund's investments for compliance with these Conditions.

(c) After making the determinations required in Condition 1(b) above, each Adviser to a participating Regulated Fund will distribute written information concerning the Potential Co-Investment Transaction (including the amount proposed to be invested by each participating Regulated Fund and each participating Affiliated Fund) to the Eligible Trustees of its participating Regulated Fund(s) for their consideration. A Regulated Fund will enter into a Co-Investment Transaction with one or more other Regulated Funds or the Affiliated Funds only if, prior to the Regulated Fund's participation in the Potential Co-Investment Transaction, a Required Majority concludes that:

(i) The terms of the transaction, including the consideration to be paid, are reasonable and fair to the Regulated Fund and its shareholders and do not involve overreaching in respect of the Regulated Fund or its shareholders on the part of any person concerned;

(ii) the transaction is consistent with:

(A) The interests of the Regulated Fund's shareholders; and

(B) the Regulated Fund's then-current Objectives and Strategies;

(iii) the investment by any other Regulated Fund(s) or Affiliated Fund(s) would not disadvantage the Regulated Fund, and participation by the Regulated Fund would not be on a basis different from, or less advantageous than, that of any other Regulated Fund(s) or Affiliated Fund(s) participating in the transaction; provided that the Required Majority shall not be prohibited from reaching the conclusions required by this Condition 2(c)(iii) if:

(A) The settlement date for another Regulated Fund or an Affiliated Fund in a Co-Investment Transaction is later than the settlement date for the Regulated Fund by no more than ten business days or earlier than the settlement date for the Regulated Fund by no more than ten business days, in either case, so long as: (x) The date on which the commitment of the Affiliated Fund and Regulated Funds is made is the same; and (y) the earliest settlement date and the latest settlement date of any Affiliated Fund or Regulated Fund participating in the transaction will occur within ten business days of each other; or

(B) any other Regulated Fund or Affiliated Fund, but not the Regulated Fund itself, gains the right to nominate a director for election to a portfolio company's board of directors, the right to have a board observer or any similar

right to participate in the governance or management of the portfolio company so long as: (x) The Eligible Trustees will have the right to ratify the selection of such director or board observer, if any; (y) the Adviser agrees to, and does, provide periodic reports to the Regulated Fund's Board with respect to the actions of such director or the information received by such board observer or obtained through the exercise of any similar right to participate in the governance or management of the portfolio company; and (z) any fees or other compensation that any other Regulated Fund or Affiliated Fund or any affiliated person of any other Regulated Fund or Affiliated Fund receives in connection with the right of one or more Regulated Funds or Affiliated Funds to nominate a director or appoint a board observer or otherwise to participate in the governance or management of the portfolio company will be shared proportionately among any participating Affiliated Funds (who may, in turn, share their portion with their affiliated persons) and any participating Regulated Fund(s) in accordance with the amount of each such party's investment; and

(iv) the proposed investment by the Regulated Fund will not involve compensation, remuneration or a direct or indirect [20] financial benefit to an Adviser, any other Regulated Fund, the Affiliated Funds or any affiliated person of any of them (other than the parties to the Co-Investment Transaction), except (A) to the extent permitted by Condition 14, (B) to the extent permitted by section 17(e) or 57(k), as applicable, (C) indirectly, as a result of an interest in the securities issued by one of the parties to the Co-Investment Transaction, or (D) in the case of fees or other compensation described in Condition 2(c)(iii)(B)(z).

3. *Right to Decline.* Each Regulated Fund has the right to decline to participate in any Potential Co-Investment Transaction or to invest less than the amount proposed.

4. *General Limitation.* Except for Follow-On Investments made in accordance with Conditions 8 and 9 below,[21] a Regulated Fund will not invest in reliance on the Order in any issuer in which a Related Party has an investment.[22]

5. *Same Terms and Conditions.* A Regulated Fund will not participate in any Potential Co-Investment Transaction unless (i) the terms, conditions, price, class of securities to be purchased, date on which the commitment is entered into and registration rights (if any) will be the same for each participating Regulated Fund and Affiliated Fund and (ii) the earliest settlement date and the latest settlement date of any participating Regulated Fund or Affiliated Fund will occur as close in time as practicable and in no event more than ten business days apart. The grant to one or more Regulated Funds or Affiliated Funds, but not the respective Regulated Fund, of the right to nominate a director for election to a portfolio company's board of directors, the right to have an observer on the board of directors or similar rights to participate in the governance or management of the portfolio company will not be interpreted so as to violate this Condition 5, if Condition 2(c)(iii)(B) is met.

6. *Standard Review Dispositions.*

(a) *General.* If any Regulated Fund or Affiliated Fund elects to sell, exchange or otherwise dispose of an interest in a security and one or more Regulated Funds and Affiliated Funds have previously participated in a Co-Investment Transaction with respect to the issuer, then:

(i) The Adviser to such Regulated Fund or Affiliated Fund [23] will notify each Regulated Fund that holds an investment in the issuer of the proposed Disposition at the earliest practical time; and

(ii) the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to participation by such Regulated Fund in the Disposition.

(b) *Same Terms and Conditions.* Each Regulated Fund will have the right to participate in such Disposition on a proportionate basis, at the same price and on the same terms and conditions as those applicable to the Affiliated Funds and any other Regulated Fund.

(c) *No Board Approval Required.* A Regulated Fund may participate in such a Disposition without obtaining prior approval of the Required Majority if:

(i)(A) the participation of each Regulated Fund and Affiliated Fund in such Disposition is proportionate to its then-current holding of the security (or securities) of the issuer that is (or are) the subject of the Disposition; [24] (B) the Board of the Regulated Fund has approved as being in the best interests of the Regulated Fund the ability to participate in such Dispositions on a pro rata basis (as described in greater detail in the application); and (C) the Board of the Regulated Fund is provided on a quarterly basis with a list of all Dispositions made in accordance with this Condition; or

(ii) each security is a Tradable Security and (A) the Disposition is not to the issuer or any affiliated person of the issuer; and (B) the security is sold for cash in a transaction in which the only term negotiated by or on behalf of the participating Regulated Funds and Affiliated Funds is price.

(d) *Standard Board Approval.* In all other cases, the Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Trustees and the Regulated Fund will participate in such Disposition solely to the extent that a Required Majority determines that it is in the Regulated Fund's best interests.

7. *Enhanced Review Dispositions.*

(a) *General.* If any Regulated Fund or Affiliated Fund elects to sell, exchange or otherwise dispose of a Pre-Boarding Investment in a Potential Co-Investment Transaction and the Regulated Funds and Affiliated Funds have not previously participated in a Co-Investment Transaction with respect to the issuer:

(i) The Adviser to such Regulated Fund or Affiliated Fund will notify each Regulated Fund that holds an investment in the issuer of the proposed Disposition at the earliest practical time;

(ii) the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to participation by such Regulated Fund in the Disposition; and

[20] For example, procuring the Regulated Fund's investment in a Potential Co-Investment Transaction to permit an affiliate to complete or obtain better terms in a separate transaction would constitute an indirect financial benefit.

[21] This exception applies only to Follow-On Investments by a Regulated Fund in issuers in which that Regulated Fund already holds investments.

[22] ''Related Party'' means (i) any Close Affiliate and (ii) in respect of matters as to which any Adviser has knowledge, any Remote Affiliate. ''Close Affiliate'' means an Adviser, the Regulated Funds, the Affiliated Funds and any other person described in section 57(b) (after giving effect to rule 57b-1) in respect of any Regulated Fund (treating any registered investment company or series thereof as a BDC for this purpose) except for limited partners included solely by reason of the reference in section 57(b) to section 2(a)(3)(D). ''Remote Affiliate'' means any person described in section 57(e) in respect of any Regulated Fund (treating any registered investment company or series thereof as a BDC for this purpose) and any limited partner holding 5% or more of the relevant limited partner interests that would be a Close Affiliate but for the exclusion in that definition.

[23] Any Variant Proprietary Account that is not advised by an Adviser is itself deemed to be an Adviser for purposes of Conditions 6(a)(i), 7(a)(i), 8(a)(i), and 9(a)(i).

[24] In the case of any Disposition, proportionality will be measured by each participating Regulated Fund's and Affiliated Fund's outstanding investment in the security in question immediately preceding the Disposition.

(iii) each Adviser will provide to the Board of each Regulated Fund that holds an investment in the issuer all information relating to the existing investments in the issuer of the Regulated Funds and Affiliated Fund, including the terms of such investments and how they were made, that is necessary for the Required Majority to make the findings required by this Condition.

(b) *Enhanced Board Approval.* The Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Trustees, and the Regulated Fund will participate in such Disposition solely to the extent that a Required Majority determines that:

(i) The Disposition complies with Condition 2(c)(i), (ii), (iii)(A), and (iv); and

(ii) the making and holding of the Pre-Boarding Investments were not prohibited by section 57 or rule 17d–1, as applicable, and records the basis for the finding in the Board minutes.

(c) *Additional Requirements.* The Disposition may only be completed in reliance on the Order if:

(i) *Same Terms and Conditions.* Each Regulated Fund has the right to participate in such Disposition on a proportionate basis, at the same price and on the same terms and conditions as those applicable to the Affiliated Funds and any other Regulated Fund;

(ii) *Original Investments.* All of the Affiliated Funds' and Regulated Funds' investments in the issuer are Pre-Boarding Investments;

(iii) *Advice of counsel.* Independent counsel to the Board advises that the making and holding of the investments in the Pre-Boarding Investments were not prohibited by section 57 (as modified by rule 57b–1) or rule 17d–1, as applicable;

(iv) *Multiple Classes of Securities.* All Regulated Funds and Affiliated Funds that hold Pre-Boarding Investments in the issuer immediately before the time of completion of the Co-Investment Transaction hold the same security or securities of the issuer. For the purpose of determining whether the Regulated Funds and Affiliated Funds hold the same security or securities, they may disregard any security held by some but not all of them if, prior to relying on the Order, the Required Majority is presented with all information necessary to make a finding, and finds, that: (x) Any Regulated Fund's or Affiliated Fund's holding of a different class of securities (including for this purpose a security with a different maturity date) is immaterial [25] in amount, including immaterial relative to the size of the issuer; and (y) the Board records the basis for any such finding in its minutes. In addition, securities that differ only in respect of issuance date, currency, or denominations may be treated as the same security; and

(v) *No control.* The Affiliated Funds, the other Regulated Funds and their affiliated persons (within the meaning of section 2(a)(3)(C) of the Act), individually or in the aggregate, do not control the issuer of the securities (within the meaning of section 2(a)(9) of the Act).

8. *Standard Review Follow-Ons.*

(a) *General.* If any Regulated Fund or Affiliated Fund desires to make a Follow-On Investment in an issuer and the Regulated Funds and Affiliated Funds holding investments in the issuer previously participated in a Co-Investment Transaction with respect to the issuer:

(i) The Adviser to each such Regulated Fund or Affiliated Fund will notify each Regulated Fund that holds securities of the portfolio company of the proposed transaction at the earliest practical time; and

(ii) the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to the proposed participation, including the amount of the proposed investment, by such Regulated Fund.

(b) *No Board Approval Required.* A Regulated Fund may participate in the Follow-On Investment without obtaining prior approval of the Required Majority if:

(i)(A) The proposed participation of each Regulated Fund and each Affiliated Fund in such investment is proportionate to its outstanding investments in the issuer or the security at issue, as appropriate,[26] immediately preceding the Follow-On Investment; and (B) the Board of the Regulated Fund has approved as being in the best interests of the Regulated Fund the ability to participate in Follow-On Investments on a pro rata basis (as described in greater detail in the application); or

(ii) it is a Non-Negotiated Follow-On Investment.

(c) *Standard Board Approval.* In all other cases, the Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Trustees and the Regulated Fund will participate in such Follow-On Investment solely to the extent that a Required Majority makes the determinations set forth in Condition 2(c). If the only previous Co-Investment Transaction with respect to the issuer was an Enhanced Review Disposition the Eligible Trustees must complete this review of the proposed Follow-On Investment both on a stand-alone basis and together with the Pre-Boarding Investments in relation to the total economic exposure and other terms of the investment.

(d) *Allocation.* If, with respect to any such Follow-On Investment:

(i) The amount of the opportunity proposed to be made available to any Regulated Fund is not based on the Regulated Funds' and the Affiliated Funds' outstanding investments in the issuer or the security at issue, as appropriate, immediately preceding the Follow-On Investment; and

(ii) the aggregate amount recommended by an Adviser to be invested in the Follow-On Investment by the participating Regulated Funds and any participating Affiliated Funds, collectively, exceeds the amount of the investment opportunity, then the Follow-On Investment opportunity will be allocated among them *pro rata* based on the size of the Internal Orders, as described in Section III.A.1.b. of the application.

(e) *Other Conditions.* The acquisition of Follow-On Investments as permitted by this Condition will be considered a Co-Investment Transaction for all purposes and subject to the other Conditions set forth in the application.

9. *Enhanced Review Follow-Ons.*

(a) *General.* If any Regulated Fund or Affiliated Fund desires to make a Follow-On Investment in an issuer that is a Potential Co-Investment Transaction and the Regulated Funds and any Affiliated Funds holding investments in the issuer have not previously

[25] In determining whether a holding is ''immaterial'' for purposes of the Order, the Required Majority will consider whether the nature and extent of the interest in the transaction or arrangement is sufficiently small that a reasonable person would not believe that the interest affected the determination of whether to enter into the transaction or arrangement or the terms of the transaction or arrangement.

[26] To the extent that a Follow-On Investment opportunity is in a security or arises in respect of a security held by the participating Regulated Funds and any Affiliated Fund, proportionality will be measured by each participating Regulated Fund's and Affiliated Fund's outstanding investment in the security in question immediately preceding the Follow-On Investment using the most recent available valuation thereof. To the extent that a Follow-On Investment opportunity relates to an opportunity to invest in a security that is not in respect of any security held by any of the participating Regulated Funds or any Affiliated Fund, proportionality will be measured by each participating Regulated Fund's and Affiliated Fund's outstanding investment in the issuer immediately preceding the Follow-On Investment using the most recent available valuation thereof.

participated in a Co-Investment Transaction with respect to the issuer:

(i) The Adviser to each such Regulated Fund or Affiliated Fund will notify each Regulated Fund that holds securities of the portfolio company of the proposed transaction at the earliest practical time;

(ii) the Adviser to each Regulated Fund that holds an investment in the issuer will formulate a recommendation as to the proposed participation, including the amount of the proposed investment, by such Regulated Fund; and

(iii) the Adviser will provide to the Board of each Regulated Fund that holds an investment in the issuer all information relating to the existing investments in the issuer of the Regulated Funds and Affiliated Funds, including the terms of such investments and how they were made, that is necessary for the Required Majority to make the findings required by this Condition.

(b) *Enhanced Board Approval.* The Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Trustees, and the Regulated Fund will participate in such Follow-On Investment solely to the extent that a Required Majority reviews the proposed Follow-On Investment both on a stand-alone basis and together with the Pre-Boarding Investments in relation to the total economic exposure and other terms and makes the determinations set forth in Condition 2(c). In addition, the Follow-On Investment may only be completed in reliance on the Order if the Required Majority of each participating Regulated Fund determines that the making and holding of the Pre-Boarding Investments were not prohibited by section 57 (as modified by rule 57b–1) or rule 17d–1, as applicable. The basis for the Board's findings will be recorded in its minutes.

(c) *Additional Requirements.* The Follow-On Investment may only be completed in reliance on the Order if:

(i) *Original Investments.* All of the Affiliated Funds' and Regulated Funds' investments in the issuer are Pre-Boarding Investments;

(ii) *Advice of counsel.* Independent counsel to the Board advises that the making and holding of the investments in the Pre-Boarding Investments were not prohibited by section 57 (as modified by rule 57b–1) or rule 17d–1, as applicable;

(iii) *Multiple Classes of Securities.* All Regulated Funds and Affiliated Funds that hold Pre-Boarding Investments in the issuer immediately before the time of completion of the Co-Investment Transaction hold the same security or securities of the issuer. For the purpose of determining whether the Regulated Funds and Affiliated Funds hold the same security or securities, they may disregard any security held by some but not all of them if, prior to relying on the Order, the Required Majority is presented with all information necessary to make a finding, and finds, that: (x) Any Regulated Fund's or Affiliated Fund's holding of a different class of securities (including for this purpose a security with a different maturity date) is immaterial in amount, including immaterial relative to the size of the issuer; and (y) the Board records the basis for any such finding in its minutes. In addition, securities that differ only in respect of issuance date, currency, or denominations may be treated as the same security; and

(iv) *No control.* The Affiliated Funds, the other Regulated Funds and their affiliated persons (within the meaning of section 2(a)(3)(C) of the Act), individually or in the aggregate, do not control the issuer of the securities (within the meaning of section 2(a)(9) of the Act).

(d) *Allocation.* If, with respect to any such Follow-On Investment:

(i) The amount of the opportunity proposed to be made available to any Regulated Fund is not based on the Regulated Funds' and the Affiliated Funds' outstanding investments in the issuer or the security at issue, as appropriate, immediately preceding the Follow-On Investment; and

(ii) the aggregate amount recommended by an Adviser to be invested in the Follow-On Investment by the participating Regulated Funds and any participating Affiliated Funds, collectively, exceeds the amount of the investment opportunity, then the Follow-On Investment opportunity will be allocated among them pro rata based on the size of the Internal Orders, as described in Section III.A.1.b. of the application.

(e) *Other Conditions.* The acquisition of Follow-On Investments as permitted by this Condition will be considered a Co-Investment Transaction for all purposes and subject to the other Conditions set forth in the application.

10. *Board Reporting, Compliance and Annual Re-Approval.*

(a) Each Adviser to a Regulated Fund will present to the Board of each Regulated Fund, on a quarterly basis, and at such other times as the Board may request, (i) a record of all investments in Potential Co-Investment Transactions made by any of the other Regulated Funds or any Affiliated Funds during the preceding quarter that fell within the Regulated Fund's then-current Objectives and Strategies and Board-Established Criteria that were not made available to the Regulated Fund, and an explanation of why such investment opportunities were not made available to the Regulated Fund; (ii) a record of all Follow-On Investments in and Dispositions of investments in any issuer in which the Regulated Fund holds any investments by any Affiliated Fund or other Regulated Fund during the prior quarter; and (iii) all information concerning Potential Co-Investment Transactions and Co-Investment Transactions, including investments made by other Regulated Funds or any Affiliated Funds that the Regulated Fund considered but declined to participate in, so that the Independent Trustees, may determine whether all Potential Co-Investment Transactions and Co-Investment Transactions during the preceding quarter, including those investments that the Regulated Fund considered but declined to participate in, comply with the Conditions.

(b) All information presented to the Regulated Fund's Board pursuant to this Condition will be kept for the life of the Regulated Fund and at least two years thereafter, and will be subject to examination by the Commission and its staff.

(c) Each Regulated Fund's chief compliance officer, as defined in rule 38a–1(a)(4), will prepare an annual report for its Board each year that evaluates -z6(and documents the basis of that evaluation) the Regulated Fund's compliance with the terms and Conditions of the application and the procedures established to achieve such compliance.

(d) The Independent Trustees will consider at least annually whether continued participation in new and existing Co-Investment Transactions is in the Regulated Fund's best interests.

11. *Record Keeping.* Each Regulated Fund will maintain the records required by section 57(f)(3) of the Act as if each of the Regulated Funds were a BDC and each of the investments permitted under these Conditions were approved by the Required Majority under section 57(f).

12. *Trustee Independence.* No Independent Trustee of a Regulated Fund will also be a director, general partner, managing member or principal, or otherwise be an ''affiliated person'' (as defined in the Act) of any Affiliated Fund.

13. *Expenses.* The expenses, if any, associated with acquiring, holding or disposing of any securities acquired in a Co-Investment Transaction (including, without limitation, the expenses of the

distribution of any such securities registered for sale under the Securities Act) will, to the extent not payable by an Adviser under its respective advisory agreements with the Regulated Funds and the Affiliated Funds, be shared by the Regulated Funds and any participating Affiliated Funds in proportion to the relative amounts of the securities held or being acquired or disposed of, as the case may be.

14. *Transaction Fees.*[27] Any transaction fee (including break-up, structuring, monitoring or commitment fees but excluding brokerage or underwriting compensation permitted by section 17(e) or 57(k)) received in connection with any Co-Investment Transaction will be distributed to the participants on a pro rata basis based on the amounts they invested or committed, as the case may be, in such Co-Investment Transaction. If any transaction fee is to be held by an Adviser pending consummation of the transaction, the fee will be deposited into an account maintained by an Adviser at a bank or banks having the qualifications prescribed in section 26(a)(1), and the account will earn a competitive rate of interest that will also be divided pro rata among the participants. None of the Adviser, the Affiliated Funds, the other Regulated Funds or any affiliated person of the Affiliated Funds or the Regulated Funds will receive any additional compensation or remuneration of any kind as a result of or in connection with a Co-Investment Transaction other than (i) in the case of the Regulated Funds and the Affiliated Funds, the pro rata transaction fees described above and fees or other compensation described in Condition 2(c)(iii)(B)(z), (ii) brokerage or underwriting compensation permitted by section 17(e) or 57(k) or (iii) in the case of the Adviser, investment advisory compensation paid in accordance with investment advisory agreements between the applicable Regulated Fund(s) or Affiliated Fund(s) and its Adviser.

15. *Independence.* If the Holders own in the aggregate more than 25 percent of the Shares of a Regulated Fund, then the Holders will vote such Shares in the same percentages as the Regulated Fund's other shareholders (not including the Holders) when voting on (1) the election of directors; (2) the removal of one or more directors; or (3) any other matter under either the Act or applicable State law affecting the Board's composition, size or manner of election.

For the Commission, by the Division of Investment Management, under delegated authority.

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2021–28324 Filed 12–28–21; 8:45 am]

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[27] Applicants are not requesting and the Commission is not providing any relief for transaction fees received in connection with any Co-Investment Transaction.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93867; File No. SR–OCC–2021–013]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Update The Options Clearing Corporation's Operational Loss Fee Pursuant to Its Capital Management Policy

December 23, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'' or ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 17, 2021, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared primarily by OCC. OCC filed the proposed rule change pursuant to Section 19(b)(3)(A)(ii)[3] of the Act and Rule 19b–4(f)(2)[4] thereunder so that the proposal was effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change would revise OCC's schedule of fees, effective January 1, 2022, to update the maximum contingent Operational Loss Fee listed in OCC's schedule of fees in accordance with OCC's Capital Management Policy. Proposed changes to OCC's schedule of fees are included as Exhibit 5 to File Number SR–OCC–2021–013. Material proposed to be added to OCC's schedule of fees as currently in effect is underlined and material proposed to be deleted is marked in strikethrough text. All capitalized terms not defined herein have the same meaning as set forth in the OCC By-Laws and Rules.[5]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, Uthe Proposed Rule Change

In its filing with the Commission, OCC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. OCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(1) Purpose

The purpose of this proposed rule change is to revise OCC's schedule of fees, effective January 1, 2022, to update the maximum aggregate Operational Loss Fee that OCC would charge Clearing Members in equal shares in the unlikely event that OCC's shareholders'' equity (''Equity'') falls below certain thresholds defined in OCC's Capital Management Policy. The proposed fee change is designed to enable OCC to replenish capital to comply with Rule 17Ad–22(e)(15) under the Exchange Act, which requires OCC, in pertinent part, to ''hold[ ] liquid net assets funded by equity to the greater of either (x) six months . . . current operating expenses, or (y) the amount determined by the board of directors to be sufficient to ensure a recovery or orderly wind-down of critical operations and service''[6] and ''[m]aintain[ ] a viable plan, approved by the board of directors and updated at least annually, for raising additional equity should its equity fall close to or below the amount required.''[7]

OCC's Capital Management Policy includes OCC's replenishment plan.[8] Pursuant to the Capital Management Policy, OCC would charge an Operational Loss Fee in equal shares to Clearing Members to raise additional capital should OCC's Equity, less the Minimum Corporate Contribution,[9] fall

[5] OCC's By-Laws and Rules can be found on OCC's public website: https://www.theocc.com/Company-Information/Documents-and-Archives/By-Laws-and-Rules.

[6] See 17 CFR 240.17Ad–22(e)(15)(ii).

[7] See 17 CFR 240.17Ad–22(e)(15)(iii).

[8] See Exchange Act Release No. 88029 (Jan. 24, 2020), 85 FR 5500 (Jan. 30, 2020) (File No. SR–OCC–2019–007) (''Order Approving OCC's Capital Management Policy'').

[9] The Minimum Corporate Contribution is defined in the Capital Management Policy as the

Continued

below certain defined thresholds relative to OCC's Target Capital Requirement (*i.e.* , a ''Trigger Event''), after first applying the unvested balance held in respect of OCC's Executive Deferred Compensation Program.[10] Based on the Board-approved Target Capital Requirement for 2022 of $268 million, a Trigger Event would occur if OCC's Equity less the Minimum Corporate Contribution falls below $241.2 million at any time or below $268 million for a period of 90 consecutive calendar days.

In the unlikely event those thresholds are breached, OCC would charge an Operational Loss Fee in an amount to raise Equity to 110% of OCC's Target Capital Requirement, up to the maximum Operational Loss Fee identified in OCC's schedule of fees less the amount of any Operational Loss Fees previously charged and not refunded.[11] OCC calculates the maximum aggregate Operational Loss Fee based on the amount determined by the Board to be sufficient for a recovery or orderly wind-down of critical operations and services (''RWD Amount''),[12] which is determined based on the assumptions in OCC's Recovery and Orderly Wind-Down Plan (''RWD Plan'').[13] In order to account for OCC's tax liability for retaining the Operational Loss Fee as earnings, OCC may apply a tax gross-up to the RWD Amount (''Adjusted RWD Amount'') depending on whether the operational loss that caused OCC's Equity to fall below the Trigger Event thresholds is tax deductible.[14]

The RWD Amount and, in turn, the Adjusted RWD Amount are determined annually based on OCC's corporate budget, the assumptions articulated in the RWD Plan, and OCC's projected effective tax rate.[15] The current Operational Loss Fee listed in OCC's schedule of fees is the Adjusted RWD Amount calculated based on OCC's 2021 corporate budget. Budgeted operating expenses in 2022 are higher than the 2021 budgeted operating expenses. This proposed rule change would revise the maximum Operational Loss Fee to reflect the Adjusted RWD Amount based on OCC's 2022 budget,[16] as follows:

Current fee schedule	Proposed fee schedule
$143,066,667.00 less the aggregate amount of Operational Loss Fees previously charged and not refunded as of the date calculated, divided by the number of Clearing Members at the time charge.	$157,000,000 less the aggregate amount of Operational Loss Fees previously charged and not refunded as of the date calculated, divided by the number of Clearing Members at the time charge.

Since the allocation of the Operational Loss Fee is a function of the number of Clearing Members at the time of the charge, the maximum Operational Loss Fee per Clearing Member is subject to fluctuation during the course of the year. However, if the proposed Operational Loss Fee were charged to 107 Clearing Members, the number of Clearing Members as of the date of this filing, the maximum Operational Loss Fee per Clearing Member would be $1,467,290.

OCC would also update the schedule of fees to reflect the levels of Equity at which OCC would charge the Operational Loss Fee according to the thresholds defined in the Capital Management Policy, as well as the level of Equity at which OCC would limit the Operational Loss Fee charged, based on OCC's current Target Capital Requirement.[17] Consistent with OCC's recently revised approach to its persistent minimum skin-in-the-game, OCC would conform the threshold in the schedule of fees to reflect that consistent with OCC's Capital Management Policy, the Trigger Event threshold is measured against Equity less the Minimum Corporate Contribution.

OCC proposes to make the fee change effective January 1, 2022, because the Board approved the Adjusted RWD Amount upon which the Operational Loss Fee is based for 2022 and the time required to self-certify the proposed change with the Commodity Futures Trading Commission (''CFTC'').

(2) Statutory Basis

OCC believes the proposed rule change is consistent with the Act[18] and the rules and regulations thereunder. In particular, OCC believes that the proposed fee change is also consistent with Section 17A(b)(3)(D) of the Act,[19] which requires that the rules of a clearing agency provide for the equitable allocation of reasonable dues, fees, and other charges among its participants. OCC believes that the proposed fee change is reasonable because it is designed to replenish OCC's Equity in the form of liquid net assets in the event that OCC's Equity, less the Minimum Corporate Contribution reserved as the primary portion of OCC's minimum persistent skin-in-the-game, falls close to or below its Target Capital Requirement so that OCC can continue to meet its obligations as a systemically important financial market utility (''SIFMU'') to Clearing Members and the general public should an operational losses materialize (including through a recovery or orderly wind-down of

minimum level of OCC's own funds maintained exclusively to cover credit losses or liquidity shortfalls, the level of which the OCC's Board of Directors (''Board'') shall determine from time to time. See Exchange Act Release No. 92038 (May 27, 2021), 86 FR 29861, 29862 (June 3, 2021) (File No. SR–OCC–2021–003). For 2022, the Board has approved a Minimum Corporate Contribution of $59 million. When combined with the unvested funds held in respect of OCC's Executive Deferred Compensation Plan contributed after January 1, 2020 (the ''EDCP Unvested Balance,'' as defined in OCC's Rules), OCC's persistent minimum level of skin-in-the-game for 2022 would be $67 million, or 25% of OCC's Target Capital Requirement. In addition to this minimum level, OCC would also contribute liquid net assets funded by equity greater than 110% of the Target Capital Requirement. See OCC Rule 1006(e).

[10] See Exchange Act Release No. 91199 (Feb. 24, 2021), 86 FR 12237, 12241 (Mar. 2, 2021) (File No. SR–OCC–2021–003) (amending OCC's replenishment plan, including the measurement for a Trigger Event, to account for the establishment of OCC's persistent minimum skin-in-the-game).

[11] See Order Approving OCC's Capital Management Policy, 85 FR at 5503.

[12] Id.

[13] The RWD Plan states OCC's basic assumptions concerning the resolution process, including assumptions about the duration of the resolution process, the cost of the resolution process, OCC's capitalization through the resolution process, the maintenance of Critical Services and Critical Support Functions, as defined by the RWD Plan, and the retention of personnel and contractual relationships. See Exchange Act Release No. 83918 (Aug. 23, 2018), 83 FR 44091, 44094 (Aug. 29, 2018) (File No. SR–OCC–2017–021).

[14] See Order Approving OCC's Capital Management Policy, 85 FR at 5503.

[15] See Order Approving OCC's Capital Management Policy, 85 FR at 5501 n.20, 5503.

[16] Confidential data and analysis evidencing the calculation of the Adjusted RWD Amount based on OCC's 2022 corporate budget is included in Exhibit 3 to File Number SR–OCC–2021–013.

[17] OCC does not propose any change to the thresholds and limits defined in the Capital Management Policy. This proposed change merely conforms the disclosure in OCC's schedule of fees to the current amounts based on the Board-approved Target Capital Requirement of $268 million.

[18] 15 U.S.C. 78a *et seq.*

[19] 15 U.S.C. 78q–1(b)(3)(D).

critical operations and services) and thereby facilitate compliance with Rule 17Ad–22(e)(15)(iii).[20] The maximum Operational Loss Fee is sized to ensure that OCC maintains sufficient liquid net assets to support its RWD Plan and imposes a contingent obligation on Clearing Members that is approximately the same amount as a Clearing Member's contingent obligation for Clearing Fund assessments for a Clearing Member operating at the minimum Clearing Fund deposit.[21] Therefore, OCC believes the proposed maximum Operational Loss Fee sized to OCC's Adjusted RWD Amount is reasonable.

OCC also believes that the proposed Operational Loss Fee would result in an equitable allocation of fees among its participants because it would be equally applicable to all Clearing Members. As the Commission has recognized, OCC's designation as a SIFMU and its role as the sole covered clearing agency for all listed options contracts in the U.S. makes it an integral part of the national system for clearance and settlement, through which ''Clearing Members, their customers, investors, and the markets as a whole derive significant benefit . . . regardless of their specific utilization of that system.'' [22] Neither the SEC nor OCC has observed any correlation between measures of Clearing Member utilization or OCC's benefit to Clearing Members [23] and its risk of operational loss.[24] As a result, OCC believes that the proposed change to OCC's fee schedule provides for the equitable allocation of reasonable fees in accordance with Section 17A(b)(3)(D) of the Act.[25]

In addition, OCC believes that the proposed rule change is consistent with Rule 17Ad–22(e)(15)(iii), which requires that OCC establish, implement, maintain and enforce written policies and procedures reasonably designed to identify, monitor, and manage OCC's general business risk, including by maintaining a viable plan, approved by the Board and updated at least annually, for raising additional equity should its equity fall close to or below the amount required under Rule 17Ad–22(e)(15)(ii).[26] While Rule 17Ad–22(e)(15)(iii) does not by its terms specify the amount of additional equity a clearing agency's plan for replenishment capital must be designed to raise, the SEC's adopting release states that ''a viable plan generally should enable the covered clearing agency to hold sufficient liquid net assets to achieve recovery or orderly wind-down.'' [27] OCC sets the maximum Operational Loss Fee at an amount sufficient to raise, on a post-tax basis, the amount determined annually by the Board to be sufficient to ensure recovery or orderly wind-down pursuant to the RWD Plan.[28] Therefore, OCC believes the proposed change to OCC's schedule of fees is consistent with Rule 17Ad–22(e)(15)(iii) and the guidance provided by the SEC in the adopting release.

OCC also believes that the proposed fee change is consistent with Section 19(g)(1) of the Act,[29] which, among other things, requires every self-regulatory organization to comply with its own rules. OCC filed its Capital Management Policy as a ''proposed rule change'' within the meaning of Section 19(b) of the Act,[30] and Rule 19b–4 under the Act.[31] The Capital Management Policy specifies that the maximum Operational Loss Fee shall be the Adjusted RWD Amount.[32] Because the Adjusted RWD Amount will change annually based, in part, on OCC's corporate budget, fee filings are necessary to ensure that the maximum Operational Loss Fee in OCC's schedule of fees remains consistent with the amount identified in the Capital Management Policy. In addition, the amounts associated with the thresholds at which OCC would charge the Operational Loss Fee and the limit to the amount would change in accordance with the Capital Management Policy are determined based upon the level at which the Board sets OCC's Target Capital Requirement. Consequently, OCC seeks to amend the amounts identified in the schedule of fees to reflect OCC's current Target Capital Requirement and OCC's current Capital Management Policy, as recently amended to reflect the establishment of the Minimum Corporate Contribution.[33] Therefore, OCC believes that the proposed change to OCC's fee schedule is consistent with Section 19(g)(1) of the Act.

(B) Clearing Agency's Statement on Burden on Competition

Section 17A(b)(3)(I) of the Act [34] requires that the rules of a clearing agency not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. OCC does not believe that the proposed rule change would have any impact or impose a burden on competition. Although the proposed Operational Loss Fee affects Clearing Members, their customers, and the markets that OCC serves, OCC believes that the proposed increase in the Operational Loss Fee would not disadvantage or favor any particular user of OCC's services in relationship to another user because the proposed Operational Loss Fee would apply equally to all Clearing Members. In addition, OCC does not believe that the proposed Operational Loss Fee imposes a significant burden on smaller firms because the maximum Operational Loss Fee imposes a contingent obligation on Clearing Members that is approximately the same amount as a Clearing Member's contingent obligation for Clearing Fund assessments for a Clearing Member operating at the minimum Clearing Fund deposit.[35] Accordingly, OCC does not believe that the proposed rule change would have any impact or impose a burden on competition.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments on the proposed rule change were not and are not intended to be solicited with respect to the proposed rule change and none have been received.

[20] 17 CFR 240.17Ad–22(e)(15)(iii).

[21] A Clearing Member operating at the minimum Clearing Fund deposit ($500,000) could be assessed up to an additional $1 million (the minimum deposit, assessed up to two times), for a total contingent obligation of $1.5 million. See OCC Rule 1006(h).

[22] *See* Order Approving OCC's Capital Management Policy, 85 FR at 5506.

[23] *Id.* (''The Commission is not aware of evidence demonstrating that those benefits are tied directly or positively correlated to an individual Clearing Member's rate of utilization of OCC's clearance and settlement services.'')

[24] *Id.* (rejecting an objection to the equal allocation of the proposed Operational Loss Fee based on the SEC's regulatory experience and OCC's analyses of Clearing Member utilization (*e.g.,* contract volume) or credit risk (*e.g.,* Clearing Fund size) and the various operational and general business risks that could trigger an Operational Loss Fee). To date, OCC has observed no correlation between Clearing Member utilization or credit risk and OCC's potential risk of operational loss. *See* Confidential Exhibit 3.

[25] 15 U.S.C. 78q–1(b)(3)(D).

[26] 17 CFR 240.17Ad–22(e)(15)(iii).

[27] Standards for Covered Clearing Agencies, Exchange Act Release No. 78961 (Sept. 28, 2016), 81 FR 70786, 70836 (Oct. 13, 2016) (File No. S7–03–14).

[28] *See* Order Approving OCC's Capital Management Policy, 85 FR at 5510 (''The Operational Loss Fee would be sized to the Adjusted RWD Amount, and therefore would be designed to provide OCC with at least enough capital either to continue as a going concern or to wind-down in an orderly fashion.'')

[29] 15 U.S.C. 78s(g)(1).

[30] 15 U.S.C. 78s(b).

[31] 17 CFR 240.19b–4.

[32] Order Approving OCC's Capital Management Policy, 85 FR at 5503.

[33] *See supra* notes 9 and 10, and accompanying text.

[34] 15 U.S.C. 78q–1(b)(3)(I).

[35] See note 21, supra.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Pursuant to Section 19(b)(3)(A)(ii) [36] of the Act, and Rule 19b–4(f)(2) thereunder,[37] the proposed rule change is filed for immediate effectiveness as it constitutes a change in fees charged to OCC Clearing Members. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. The proposal shall not take effect until all regulatory actions required with respect to the proposal are completed.[38]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–OCC–2021–013 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–OCC–2021–013. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of OCC and on OCC's website at *https://www.theocc.com/Company-Information/Documents-and-Archives/By-Laws-and-Rules*.

All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR–OCC–2021–013 and should be submitted on or before January 19, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[39]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2021–28327 Filed 12–28–21; 8:45 am]

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[36] 15 U.S.C. 78s(b)(3)(A)(ii).

[37] 17 CFR 240.19b–4(f)(2).

[38] Notwithstanding its immediate effectiveness, implementation of this rule change will be delayed until this change is deemed certified under CFTC Regulation 40.6.

[39] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93859; File No. SR–NYSEArca–2021–31]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Disapproving a Proposed Rule Change To List and Trade Shares of the Valkyrie Bitcoin Fund Under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares)

December 22, 2021.

I. Introduction

On April 23, 2021, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares (''Shares'') of the Valkyrie Bitcoin Fund (''Trust'') under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares). The proposed rule change was published for comment in the **Federal Register** on May 12, 2021.[3]

On June 22, 2021, pursuant to Section 19(b)(2) of the Exchange Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5] On August 9, 2021, the Commission instituted proceedings under Section 19(b)(2)(B) of the Exchange Act [6] to determine whether to approve or disapprove the proposed rule change.[7] On November 1, 2021, the Commission designated a longer period for Commission action on the proposed rule change.[8]

This order disapproves the proposed rule change. The Commission concludes that NYSE Arca has not met its burden under the Exchange Act and the Commission's Rules of Practice to demonstrate that its proposal is consistent with the requirements of Exchange Act Section 6(b)(5), and in particular, the requirement that the rules of a national securities exchange be ''designed to prevent fraudulent and manipulative acts and practices'' and ''to protect investors and the public interest.'' [9]

When considering whether NYSE Arca's proposal to list and trade the Shares is designed to prevent fraudulent and manipulative acts and practices, the Commission applies the same standard used in its orders considering previous proposals to list bitcoin [10]-based commodity trusts and bitcoin-based trust issued receipts.[11] As the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 91771 (May 6, 2021), 86 FR 26073 (''Notice''). Comments on the proposed rule change can be found at: *https://www.sec.gov/comments/sr-nysearca-2021-31/srnysearca202131.htm*.

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 92233, 86 FR 34107 (June 28, 2021).

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release No. 92610, 86 FR 44763 (Aug. 13, 2021).

[8] *See* Securities Exchange Act Release No. 93489, 86 FR 61344 (Nov. 5, 2021).

[9] 15 U.S.C. 78f(b)(5).

[10] Bitcoins are digital assets that are issued and transferred via a decentralized, open-source protocol used by a peer-to-peer computer network through which transactions are recorded on a public transaction ledger known as the ''bitcoin blockchain.'' The bitcoin protocol governs the creation of new bitcoins and the cryptographic system that secures and verifies bitcoin transactions. *See, e.g.,* Notice, 86 FR at 26074–75.

[11] *See* Order Setting Aside Action by Delegated Authority and Disapproving a Proposed Rule Change, as Modified by Amendments No. 1 and 2, To List and Trade Shares of the Winklevoss Bitcoin Trust, Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (Aug. 1, 2018) (SR–BatsBZX–2016–30) (''Winklevoss Order''); Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, To Amend NYSE Arca Rule

Commission has explained, an exchange that lists bitcoin-based exchange-traded products (''ETPs'') can meet its obligations under Exchange Act Section 6(b)(5) by demonstrating that the exchange has a comprehensive surveillance-sharing agreement with a regulated market of significant size related to the underlying or reference bitcoin assets.[12]

The standard requires such surveillance-sharing agreements since they ''provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.'' [13] The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance-sharing agreement with markets trading the underlying assets for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules.[14] The hallmarks of a surveillance-sharing agreement are that the agreement provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party.[15]

In the context of this standard, the terms ''significant market'' and ''market of significant size'' include a market (or group of markets) as to which (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to successfully manipulate the ETP, so that a surveillance-sharing agreement would assist in detecting and deterring misconduct, and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.[16] A surveillance-sharing agreement must be entered into with a ''significant market'' to assist in detecting and deterring manipulation of the ETP, because a person attempting to manipulate the ETP is reasonably likely to also engage in trading activity on that ''significant market.'' [17]

Consistent with this standard, for the commodity-trust ETPs approved to date for listing and trading, there has been in *every* case at least one significant, regulated market for trading futures on the underlying commodity—whether gold, silver, platinum, palladium, or copper—and the ETP listing exchange has entered into surveillance-sharing agreements with, or held Intermarket Surveillance Group (''ISG'') membership in common with, that market.[18] Moreover, the surveillance-sharing agreements have been consistently present whenever the Commission has approved the listing and trading of derivative securities, even where the underlying securities were also listed on national securities exchanges—such as options based on an index of stocks traded on a national securities exchange—and were thus subject to the Commission's direct regulatory authority.[19]

Listing exchanges have also attempted to demonstrate that other means besides surveillance-sharing agreements will be sufficient to prevent fraudulent and manipulative acts and practices, including that the bitcoin market as a whole or the relevant underlying bitcoin market is ''uniquely'' and ''inherently'' resistant to fraud and manipulation.[20] In response, the Commission has agreed that, if a listing exchange could establish that the underlying market inherently possesses a unique resistance to manipulation beyond the protections that are utilized by traditional commodity or securities markets, it would not necessarily need to enter into a surveillance-sharing agreement with a regulated significant market.[21] Such resistance to fraud and manipulation, however, must be novel and beyond those protections that exist in traditional commodity markets or equity markets for which the Commission has

8.201–E (Commodity-Based Trust Shares) and To List and Trade Shares of the United States Bitcoin and Treasury Investment Trust Under NYSE Arca Rule 8.201–E, Securities Exchange Act Release No. 88284 (Feb. 26, 2020), 85 FR 12595 (Mar. 3, 2020) (SR–NYSEArca–2019–39) (''USBT Order''); Order Disapproving a Proposed Rule Change To List and Trade Shares of the WisdomTree Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 93700 (Dec. 1, 2021), 86 FR 69322 (Dec. 7, 2021) (SR–CboeBZX–2021–024) (''WisdomTree Order''). *See also* Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, Relating to the Listing and Trading of Shares of the SolidX Bitcoin Trust Under NYSE Arca Equities Rule 8.201, Securities Exchange Act Release No. 80319 (Mar. 28, 2017), 82 FR 16247 (Apr. 3, 2017) (SR–NYSEArca–2016–101) (''SolidX Order''). The Commission also notes that orders were issued by delegated authority on the following matters: Order Disapproving a Proposed Rule Change To List and Trade the Shares of the ProShares Bitcoin ETF and the ProShares Short Bitcoin ETF, Securities Exchange Act Release No. 83904 (Aug. 22, 2018), 83 FR 43934 (Aug. 28, 2018) (SR–NYSEArca–2017–139) (''ProShares Order''); Order Disapproving a Proposed Rule Change To List and Trade the Shares of the GraniteShares Bitcoin ETF and the GraniteShares Short Bitcoin ETF, Securities Exchange Act Release No. 83913 (Aug. 22, 2018), 83 FR 43923 (Aug. 28, 2018) (SR–CboeBZX–2018–001) (''GraniteShares Order''); Order Disapproving a Proposed Rule Change To List and Trade Shares of the VanEck Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 93559 (Nov. 12, 2021), 86 FR 64539 (Nov. 18, 2021) (SR–CboeBZX–2021–019).

[12] *See* USBT Order, 85 FR at 12596. *See also* Winklevoss Order, 83 FR at 37592 n.202 and accompanying text (discussing previous Commission approvals of commodity-trust ETPs); GraniteShares Order, 83 FR at 43925–27 nn.35–39 and accompanying text (discussing previous Commission approvals of commodity-futures ETPs).

[13] *See* Amendment to Rule Filing Requirements for Self-Regulatory Organizations Regarding New Derivative Securities Products, Securities Exchange Act Release No. 40761 (Dec. 8, 1998), 63 FR 70952, 70959 (Dec. 22, 1998) (''NDSP Adopting Release''). *See also* Winklevoss Order, 83 FR at 37594; ProShares Order, 83 FR at 43936; GraniteShares Order, 83 FR at 43924; USBT Order, 85 FR at 12596.

[14] *See* NDSP Adopting Release, 63 FR at 70959.

[15] *See* Winklevoss Order, 83 FR at 37592–93; Letter from Brandon Becker, Director, Division of Market Regulation, Commission, to Gerard D. O'Connell, Chairman, Intermarket Surveillance Group (June 3, 1994), *available at https://www.sec.gov/divisions/marketreg/mr-noaction/isg060394.htm.*

[16] *See* Winklevoss Order, 83 FR at 37594. This definition is illustrative and not exclusive. There could be other types of ''significant markets'' and ''markets of significant size,'' but this definition is an example that will provide guidance to market participants. *See id.*

[17] *See* USBT Order, 85 FR at 12597.

[18] *See* Winklevoss Order, 83 FR at 37594.

[19] *See* USBT Order, 85 FR at 12597; Securities Exchange Act Release No. 33555 (Jan. 31, 1994), 59 FR 5619, 5621 (Feb. 7, 1994) (SR–Amex–93–28) (order approving listing of options on American Depository Receipts (''ADRs'')). The Commission has also required a surveillance-sharing agreement in the context of index options even when (i) all of the underlying index component stocks were either registered with the Commission or exempt from registration under the Exchange Act; (ii) all of the underlying index component stocks traded in the U.S. either directly or as ADRs on a national securities exchange; and (iii) effective international ADR arbitrage alleviated concerns over the relatively smaller ADR trading volume, helped to ensure that ADR prices reflected the pricing on the home market, and helped to ensure more reliable price determinations for settlement purposes, due to the unique composition of the index and reliance on ADR prices. *See* Securities Exchange Act Release No. 26653 (Mar. 21, 1989), 54 FR 12705, 12708 (Mar. 28, 1989) (SR–Amex–87–25) (stating that ''surveillance-sharing agreements between the exchange on which the index option trades and the markets that trade the underlying securities are necessary'' and that ''[t]he exchange of surveillance data by the exchange trading a stock index option and the markets for the securities comprising the index is important to the detection and deterrence of intermarket manipulation.''). And the Commission has required a surveillance-sharing agreement even when approving options based on an index of stocks traded on a national securities exchange. *See* Securities Exchange Act Release No. 30830 (June 18, 1992), 57 FR 28221, 28224 (June 24, 1992) (SR–Amex–91–22) (stating that surveillance-sharing agreements ''ensure the availability of information necessary to detect and deter potential manipulations and other trading abuses'').

[20] *See* USBT Order, 85 FR at 12597.

[21] *See* Winklevoss Order, 83 FR at 37580, 37582–91 (addressing assertions that ''bitcoin and bitcoin [spot] markets'' generally, as well as one bitcoin trading platform specifically, have unique resistance to fraud and manipulation); *see also* USBT Order, 85 FR at 12597.

long required surveillance-sharing agreements in the context of listing derivative securities products.[22] No listing exchange has satisfied its burden to make such demonstration.[23]

Here, NYSE Arca contends that approval of the proposal is consistent with Section 6(b)(5) of the Exchange Act, in particular Section 6(b)(5)'s requirement that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest.[24] Although NYSE Arca recognizes the Commission's concern with potential manipulation of bitcoin ETPs in prior disapproval orders, NYSE Arca argues that the proposal is consistent with Section 6(b)(5) of the Exchange Act because the growth of liquidity and presence of arbitrage in the spot market for bitcoin as well as the methodology and framework of the Index (as defined below) that is used to determine the value of the assets and net asset value (''NAV'') of the Trust sufficiently mitigate effects of potential manipulation in the bitcoin market.[25] Further, NYSE Arca believes that the proposal would provide investors a more convenient, more efficient, and less risky way to invest in bitcoin than the purchase of a standalone bitcoin.[26]

In the analysis that follows, the Commission examines whether the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act by addressing: in Section III.B.1 assertions that other means besides surveillance-sharing agreements will be sufficient to prevent fraudulent and manipulative acts and practices; in Section III.B.2 assertions relating to NYSE Arca's surveillance-sharing agreements related to bitcoin; and in Section III.C assertions that the proposal is consistent with the protection of investors and the public interest. As discussed further below, NYSE Arca repeats various assertions made in prior bitcoin-based ETP proposals that the Commission has previously addressed and rejected—and more importantly, NYSE Arca does not respond to the Commission's reasons for rejecting those assertions but merely repeats them. The Commission concludes that NYSE Arca has not established that other means to prevent fraudulent and manipulative acts and practices are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Commission further concludes that NYSE Arca has not established that it has a comprehensive surveillance-sharing agreement with a regulated market of significant size related to bitcoin. As a result, the Commission is unable to find that the proposed rule change is consistent with the statutory requirements of Exchange Act Section 6(b)(5).

The Commission again emphasizes that its disapproval of this proposed rule change does not rest on an evaluation of whether bitcoin, or blockchain technology more generally, has utility or value as an innovation or an investment. Rather, the Commission is disapproving this proposed rule change because, as discussed below, NYSE Arca has not met its burden to demonstrate that its proposal is consistent with the requirements of Exchange Act Section 6(b)(5).

II. Description of the Proposed Rule Change

As described in more detail in the Notice,[27] the Exchange proposes to list and trade the Shares of the Trust under NYSE Arca Rule 8.201–E, which governs the listing and trading of Commodity-Based Trust Shares on the Exchange.

The investment objective of the Trust will be for the Shares to reflect the performance of the value of a bitcoin as represented by the CF Bitcoin U.S. Settlement Price (''Index''), less the Trust's liabilities and expenses.[28] The Trust will use the Index to calculate the Trust's NAV. The Index was created and is administered by CF Benchmarks Ltd. (''Benchmark Administrator'') and serves as a once-a-day benchmark rate of the U.S. dollar price of bitcoin (USD/BTC), calculated as of 4:00 p.m. E.T.[29] The Index aggregates the trade flow of several bitcoin platforms during an observation window between 3:00 p.m. and 4:00 p.m. E.T. into the U.S. dollar price of one bitcoin at 4:00 p.m. E.T. The current constituent bitcoin platforms of the Index are Bitstamp, Coinbase, Gemini, itBit, and Kraken (''Constituent Bitcoin Platforms''). The Index is calculated based on the ''Relevant Transactions'' [30] of all of its Constituent Bitcoin Platforms. All Relevant Transactions are added to a joint list, recording the time of execution, trade price, and size for each transaction, and the list is partitioned by timestamp into 12 equally-sized time intervals of five minute length.[31] For each partition separately, the volume-weighted median trade price is calculated from the trade prices and sizes of all Relevant Transactions.[32] The Index is then determined by the arithmetic mean of the volume-weighted medians of all partitions.[33]

The Shares of the Trust represent units of fractional undivided beneficial interest in, and ownership of, the Trust. The Trust will only hold bitcoin. The Custodian will establish accounts that hold the bitcoins deposited with the Custodian on behalf of the Trust.[34]

The Administrator will calculate the NAV of the Trust once each Exchange trading day. The Sponsor will publish the NAV and NAV per Share as soon as practicable after their determination and availability, and the NAV will be released after the end of the Core Trading Session (4:00 p.m. E.T.). The NAV of the Trust is not officially struck until later in the day (often by 5:30 p.m. E.T, and usually by 8:00 p.m. E.T.). The Trust's NAV per Share is calculated by taking the current market value of its total assets, less any liabilities of the Trust, and dividing that total by the total number of outstanding Shares. The bitcoin held by the Trust will be valued based on the price set by the Index.[35]

The Trust will provide website disclosure of its bitcoin holdings daily.[36] The Trust will also disseminate an intraday indicative value (''IIV'') per Share updated every 15 seconds by one or more major market data vendors

[22] *See* USBT Order, 85 FR at 12597.

[23] *See supra* note 11.

[24] *See* Notice, 86 FR at 26080–81.

[25] *See id.* at 26078–80.

[26] *See id.* at 26073, 26080.

[27] *See* Notice, *supra* note 3. *See also* Registration Statement on Form S–1/A, dated April 30, 2021 (File No. 333–252344), filed with the Commission on behalf of the Trust (''Registration Statement'').

[28] Valkyrie Digital Assets LLC is the sponsor of the Trust (''Sponsor'') and Delaware Trust Company is the trustee. Coinbase Custody Trust Company, LLC (''Custodian'') will act as custodian for the Trust's bitcoins. U.S. Bancorp Fund Services, LLC (''Administrator'') will act as the transfer agent and administrator of the Trust. *See* Notice, 86 FR at 26073.

[29] According to NYSE Arca, the Index is based on materially the same methodology (except calculation time, as described herein) as the Benchmark Administrator's CME CF Bitcoin Reference Rate (''BRR''), which was first introduced on November 14, 2016, and is the rate on which bitcoin futures contracts are cash-settled in U.S. dollars on the Chicago Mercantile Exchange (''CME''). The Index is calculated as of 4:00 p.m. E.T., whereas the BRR is calculated as of 4:00 p.m. London Time. *See id.* at 26076 & n.9.

[30] According to the Exchange, a ''Relevant Transaction'' is any cryptocurrency versus U.S. dollar spot trade that occurs during the observation window between 3:00 p.m. and 4:00 p.m. E.T. on a Constituent Bitcoin Platform in the BTC/USD pair that is reported and disseminated by a Constituent Bitcoin Platform and observed by the Benchmark Administrator. *See id.* at 26076 n.10.

[31] *See id.* at 26076.

[32] *See id.* According to the Exchange, a volume-weighted median differs from a standard median in that a weighting factor, in this case trade size, is factored into the calculation. *See id.*

[33] *See id.*

[34] *See id.* at 26073.

[35] *See id.* at 26076.

[36] *See id.* at 26081.

during the Exchange's Core Trading Session (normally 9:30 a.m. to 4:00 p.m. E.T.). The IIV will be calculated by a third-party financial data provider using the prior day's closing NAV per Share of the Trust as a base and updating that value throughout the trading day to reflect changes in the most recently reported price level of the CME CF Bitcoin Real-Time Index (''BRTI''), as reported by CME Group, Inc., Bloomberg, L.P., or another reporting service.[37]

The Trust will issue and redeem Shares to authorized participants on an ongoing basis in one or more ''Baskets'' of 50,000 Shares. The creation and redemption of a Basket requires the delivery to the Trust, or the distribution by the Trust, of the number of whole and fractional bitcoins represented by each Basket being created or redeemed.[38] Creation orders and redemption orders may be placed either ''in-kind'' or ''in-cash.'' Although the Trust will create Baskets only upon the receipt of bitcoins, and will redeem Baskets only by distributing bitcoins, an authorized participant may deposit cash with the Administrator, which will facilitate the purchase or sale of bitcoins through a liquidity provider on behalf of an authorized participant (''Conversion Procedures'').[39]

III. Discussion

A. The Applicable Standard for Review

The Commission must consider whether NYSE Arca's proposal is consistent with the Exchange Act. Section 6(b)(5) of the Exchange Act requires, in relevant part, that the rules of a national securities exchange be designed ''to prevent fraudulent and manipulative acts and practices'' and ''to protect investors and the public interest.'' [40] Under the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the self-regulatory organization ['SRO'] that proposed the rule change.'' [41]

The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,[42] and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the applicable rules and regulations.[43] Moreover, ''unquestioning reliance'' on an SRO's representations in a proposed rule change is not sufficient to justify Commission approval of a proposed rule change.[44]

B. Whether NYSE Arca Has Met Its Burden To Demonstrate That the Proposal Is Designed To Prevent Fraudulent and Manipulative Acts and Practices

(1) Assertions That Other Means Besides Surveillance-Sharing Agreements Will Be Sufficient To Prevent Fraudulent and Manipulative Acts and Practices

As stated above, the Commission has recognized that a listing exchange could demonstrate that other means to prevent fraudulent and manipulative acts and practices are sufficient to justify dispensing with a comprehensive surveillance-sharing agreement with a regulated market of significant size, including by demonstrating that the bitcoin market as a whole or the relevant underlying bitcoin market is uniquely and inherently resistant to fraud and manipulation.[45] Such resistance to fraud and manipulation must be novel and beyond those protections that exist in traditional commodities or securities markets.[46]

NYSE Arca asserts that the bitcoin marketplace has matured rapidly in recent years regarding user growth, market capitalization, volume, market participants, and liquidity shifts, such that billion-dollar bitcoin transactions have occurred without significantly distorting the marketplace.[47] NYSE Arca further asserts that bitcoin trades in a well-arbitraged and distributed market.[48] NYSE Arca concludes that, due to the linkage between the bitcoin markets and the presence of arbitrageurs in those markets, the manipulation of the price of bitcoin on any Constituent Bitcoin Platform would likely require overcoming the liquidity supply of such arbitrageurs who are potentially eliminating any cross-market pricing differences.[49]

As with the previous proposals, the Commission here concludes that the Exchange's assertions about the nature of the bitcoin market do not constitute other means to prevent fraud and manipulation sufficient to justify dispensing with the requisite surveillance-sharing agreement.[50] The Exchange argues that the maturation of the bitcoin market mitigates against the Commission's concerns about fraud and manipulation,[51] but NYSE Arca provides no evidence for how such maturation serves to detect and deter potential fraud and manipulation. Nor does the Exchange provide any data or analysis to support its assertions regarding efficient price arbitrage across bitcoin platforms, either in terms of how closely bitcoin prices are aligned across different bitcoin trading venues or how quickly price disparities may be arbitraged away. Indeed, NYSE Arca

[37] According to NYSE Arca, the BRTI is calculated in real time based on the universe of the currently unmatched limit orders to buy or sell in the BTC/USD pair of all Constituent Bitcoin Platforms. *See id.* at 26076.

[38] *See id.* at 26076–77.

[39] The Conversion Procedures will be facilitated by a single liquidity provider, which will be selected by the Sponsor on an order-by-order basis. In the event that an order cannot be filled in its entirety by a single liquidity provider, additional liquidity provider(s) will be selected by the Sponsor to fill the remaining amount. *See id.* at 26076–78.

[40] 15 U.S.C. 78f(b)(5). Pursuant to Section 19(b)(2) of the Exchange Act, 15 U.S.C. 78s(b)(2), the Commission must disapprove a proposed rule change filed by a national securities exchange if it does not find that the proposed rule change is consistent with the applicable requirements of the Exchange Act. Exchange Act Section 6(b)(5) states that an exchange shall not be registered as a national securities exchange unless the Commission determines that ''[t]he rules of the exchange are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by this title matters not related to the purposes of this title or the administration of the exchange.'' 15 U.S.C. 78f(b)(5).

[41] Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

[42] *See id.*

[43] *See id.*

[44] *Susquehanna Int'l Group, LLP* v. *Securities and Exchange Commission*, 866 F.3d 442, 447 (D.C. Cir. 2017) (''Susquehanna'').

[45] *See* USBT Order, 85 FR at 12597 n.23. The Commission is not applying a ''cannot be manipulated'' standard. Instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met. *See id.*

[46] *See id.* at 12597.

[47] *See* Notice, 86 FR at 26078.

[48] *See id.* at 26080.

[49] *See id.*

[50] One commenter describes digital assets such as bitcoin, and the blockchains on which they rely, as having complexity that makes users vulnerable to fraud. *See* letter from JC, dated June 24, 2021 (''JC Letter'').

[51] The Commission notes that the Exchange does not explicitly tie the asserted maturation of the bitcoin market to an argument that such market evolution provides sufficient means besides surveillance-sharing agreements to prevent fraud and manipulation.

concedes that ''the global [b]itcoin market is not inherently resistant to fraud and manipulation.'' [52] As stated above, ''unquestioning reliance'' on an SRO's representations in a proposed rule change is not sufficient to justify Commission approval of a proposed rule change.[53]

Efficient price arbitrage, moreover, is not sufficient to dispense with surveillance-sharing agreements.[54] The Commission has stated, for example, that even for equity options based on securities listed on national securities exchanges, the Commission relies on surveillance-sharing agreements to detect and deter fraud and manipulation.[55] Here, the Exchange provides no evidence to support its assertion of efficient price arbitrage across bitcoin platforms, let alone any evidence that price arbitrage in the bitcoin market is novel or unique so as to warrant the Commission dispensing with the requisite surveillance-sharing agreement. Moreover, NYSE Arca does not take into account that a market participant with a dominant ownership position would not find it prohibitively expensive to overcome the liquidity supplied by arbitrageurs and could use dominant market share to engage in manipulation.[56]

Furthermore, NYSE Arca concedes that the global bitcoin market is not inherently resistant to fraud and manipulation and that concerns exist over whether bitcoin trading platforms ''have mechanisms in place to report and remediate price and overall, ensure market integrity.'' [57] In addition, the Trust's Registration Statement acknowledges that ''[bitcoin platforms] are relatively new and, in some cases, largely unregulated, and, therefore, may be more exposed to fraud and security breaches than established, regulated exchanges for other financial assets or instruments;'' that the bitcoin network is currently vulnerable to a ''51% attack,'' in which a bad actor or actors that control a majority of the processing power dedicated to mining on the bitcoin network may be able to gain full control of the network and the ability to manipulate the bitcoin blockchain; that ''in 2019 there were reports claiming that 80–95% of Bitcoin trading volume on [bitcoin platforms] was false or non-economic in nature;'' and that ''over the past several years, some [bitcoin trading platforms] have been closed due to fraud and manipulative activity, business failure or security breaches.'' [58]

NYSE Arca also does not contest the presence of possible sources of fraud and manipulation in the bitcoin spot market generally that the Commission has raised in previous orders, which have included (1) ''wash'' trading, (2) persons with a dominant position in bitcoin manipulating bitcoin pricing, (3) hacking of the bitcoin network and trading platforms, (4) malicious control of the bitcoin network, (5) trading based on material, non-public information (such as plans of market participants to significantly increase or decrease their holdings in bitcoin; new sources of demand for bitcoin; the decision of a bitcoin-based investment vehicle on how to respond to a ''fork'' in the bitcoin blockchain, which would create two different, non-interchangeable types of bitcoin), or based on the dissemination of false and misleading information, (6) manipulative activity involving the purported ''stablecoin'' Tether (USDT), and (7) fraud and manipulation at bitcoin trading platforms.[59]

Instead, NYSE Arca asserts that the methodology and framework of the Index used by the Trust to determine the value of its bitcoin assets and its NAV serve to mitigate against fraud and manipulation.[60] First, NYSE Arca asserts that the methodology employed in constructing the Index makes the Index more resistant to manipulation than other measurements that employ different methodologies and that the Benchmark Administrator aggregates the trade data from the Constituent Bitcoin Platforms in a manner designed to resist manipulation.[61] NYSE Arca states that the Index utilizes partitions to ensure large individual trades have a limited effect on the price of the Index, and the Index utilizes volume-weighted medians to ensure that outlying prices do not have an excessive effect on the value of a partition.[62] NYSE Arca also states that transactions from a Constituent Bitcoin Platform may be excluded from the Index calculation if they are deemed potentially erroneous.[63]

Second, NYSE Arca argues that the Index's exclusive use of transactions from Constituent Bitcoin Platforms mitigates the effects of potential manipulation of the bitcoin market.[64] NYSE Arca states that, to be eligible for inclusion in the Index, a Constituent Bitcoin Platform must make trade and order data available through an Automatic Programming Interface with sufficient reliability, relevant data, and appropriate speed, and must meet a minimum trading volume threshold.[65] In addition, NYSE Arca states that a Constituent Bitcoin Platform must enforce policies to ensure fair and transparent market conditions; have processes in place to impede illegal or manipulative trading practices; and comply with applicable law and regulation, including proper Anti-Money Laundering (''AML'') and Know-Your-Customer (''KYC'') procedures.[66] NYSE Arca states that the calculation agent of the Index conducts a thorough review of any bitcoin trading platform under consideration and the arrangements of all Constituent Bitcoin Platforms are reviewed regularly to ensure they continue to meet all criteria.[67]

Third, NYSE Arca asserts that the Commodity Futures Trading Commission (''CFTC'') has been successfully exercising its enforcement authority related to fraud and manipulation on the Constituent Bitcoin Platforms.[68] In addition, the Exchange asserts that the Constituent Bitcoin Platforms must enter into a data sharing agreement with the CME, cooperate with inquiries and investigations of regulators and the Benchmark Administrator, and submit each of their clients to their KYC procedures.[69] According to the Exchange, in the case of any suspicious trades on the Constituent Bitcoin Platforms, the CME would therefore be able to discover all

[52] *See* Notice, 86 FR at 26080. *See also id.* at 26078 (''There has been concern over whether cryptocurrency exchanges have mechanisms in place to report and remediate price and overall, ensure integrity.'').

[53] *See supra* note 44.

[54] *See* Winklevoss Order, 83 FR at 37586; SolidX Order, 82 FR at 16256–57; USBT Order, 85 FR at 12601.

[55] *See, e.g.,* USBT Order, 85 FR at 12601.

[56] *See, e.g.,* Winklevoss Order, 83 FR at 37584; USBT Order, 85 FR at 12600–01.

[57] *See supra* note 52 and accompanying text.

[58] *See* Registration Statement at 14, 17, 36.

[59] See USBT Order, 85 FR at 12600–01 & nn.66–67 (discussing J. Griffin & A. Shams, *Is Bitcoin Really Untethered?* (October 28, 2019), *available at https://ssrn.com/abstract=3195066* and published in 75 J. Finance 1913 (2020)); Winklevoss Order, 83 FR at 37585–86.

[60] *See* Notice, 86 FR at 26078, 26080.

[61] *See id.* at 26076, 26079.

[62] *See id.* at 26079.

[63] *See id.* The Exchange states that, where a Constituent Bitcoin Platform's volume-weighted median transaction price exhibits an absolute percentage deviation from the volume-weighted median price of other Constituent Bitcoin Platform transactions greater than the potentially erroneous data parameter (10%), then transactions from that Constituent Bitcoin Platform are deemed potentially erroneous and excluded from the index calculation. *See id.*

[64] *See id.* at 26080.

[65] *See id.* at 26078. The Exchange states that the Index included over $133,293,551,000 in bitcoin trades (approximately 16,304,168 bitcoins) during the one-year period ended December 31, 2020. *See id.* at 26076.

[66] *See id.* at 26078.

[67] *See id.* at 26079.

[68] *See id.*

[69] *See id.*

material trade information, including the identities of the customers placing the trades.[70]

Finally, NYSE Arca asserts that the oversight of the Index by the Benchmark Administrator and the CME mitigates concerns relating to manipulation.[71] The Exchange states that, to date, there has been no evidence that the Index has been subject to manipulation or that the ''Index provider'' [72] has been failing to maintain processes and controls to prevent manipulation by its organization. It further asserts that the CME participates in an oversight committee of the Index that is responsible for regularly reviewing and overseeing the methodology, practice, standards, and scope of the Index to ensure that it continues to accurately track the spot prices of bitcoin.[73] According to the Exchange, given that the Index formula and data sources are publicly available, if manipulation of the Index were to occur, it would be quickly detected by the CME and hundreds of sophisticated market participants.[74]

Based on assertions made and the information provided, the Commission can find no basis to conclude that NYSE Arca has articulated other means to prevent fraud and manipulation that are sufficient to justify dispensing with the requisite surveillance-sharing agreement. First, the record does not demonstrate that the proposed methodology for calculating the Index would make the proposed ETP resistant to fraud or manipulation such that a surveillance-sharing agreement with a regulated market of significant size is unnecessary.[75] Specifically, the Exchange has not assessed the possible influence that spot platforms not included among the Constituent Bitcoin Platforms would have on bitcoin prices used to calculate the Index. As discussed above, NYSE Arca does not contest the presence of possible sources of fraud and manipulation in the bitcoin spot market generally.[76] Instead, NYSE Arca focuses its analysis on the Constituent Bitcoin Platforms. Importantly, however, the record does not demonstrate that these possible sources of fraud and manipulation in the broader bitcoin spot market do not affect the Constituent Bitcoin Platforms that represent a slice of the bitcoin spot market. To the extent that fraudulent and manipulative trading on the broader bitcoin market could influence prices or trading activity on the Constituent Bitcoin Platforms, the Constituent Bitcoin Platforms would not be inherently resistant to manipulation.[77]

Moreover, the Exchange's assertions that the Index's methodology helps make the Index resistant to manipulation are contradicted by the Registration Statement's own statements. The Sponsor raises, but does not address here, concerns regarding the Index in the Registration Statement, stating that ''the [Index] has a limited history and there are limitations with the price of bitcoin reflected there.'' [78] And while the Exchange asserts that the Index's exclusive use of Constituent Bitcoin Platforms helps make the Index resistant to manipulation, such assertions are called into question by the Sponsor's own statements in the Registration Statement that ''[b]itcoin [platforms] on which users trade bitcoin . . . may be more exposed to fraud and security breaches than established, regulated exchanges for other financial assets or instruments, which could have a negative impact on the performance of the Trust.'' [79] Constituent Bitcoin Platforms are a subset of the existing bitcoin platforms. Although the Sponsor raises concerns regarding fraud and security of bitcoin platforms in the Registration Statement, the Exchange does not explain how or why such concerns are consistent with its assertion that the Index is resistant to fraud and manipulation.

NYSE Arca also has not shown that its proposed use of 12 equally-sized time intervals of five minute length over the observation window between 3:00 p.m. and 4:00 p.m. E.T. to calculate the Index would effectively be able to eliminate fraudulent or manipulative activity that is not transient. Fraud and manipulation in the bitcoin spot market could persist for a ''significant duration.'' [80] The Exchange does not connect the use of such partitions to the duration of the effects of the wash and fictitious trading that may exist in the bitcoin spot market.[81] Thus, the Exchange fails to establish how the Index's methodology eliminates fraudulent or manipulative activity that is not transient.[82]

While the Exchange asserts that the oversight of the Constituent Bitcoin Platforms helps to prevent and detect manipulation, the level of regulation of the Constituent Bitcoin Platforms is not equivalent to the obligations, authority, and oversight of national securities exchanges or futures exchanges and therefore is not an appropriate substitute.[83] National securities exchanges are required to have rules that are ''designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.'' [84] Moreover, national securities exchanges must file proposed rules with the Commission regarding certain material aspects of their operations,[85] and the Commission has the authority to disapprove any such rule that is not consistent with the requirements of the Exchange Act.[86] Thus, national securities exchanges are subject to Commission oversight of, among other things, their governance, membership qualifications, trading rules, disciplinary procedures, recordkeeping, and fees.[87]

The Constituent Bitcoin Platforms, on the other hand, have none of these requirements (none are registered as a national securities exchange).[88] While the Exchange asserts that various entities require the Constituent Bitcoin Platforms to adopt certain policies and processes, including AML/KYC

[70] *See id.*

[71] *See id.* at 26076, 26079.

[72] *See id.* at 26079. The Exchange uses the term ''Index provider'' with respect to this particular assertion. The Commission understands the term to mean the Benchmark Administrator.

[73] *See id.* at 26076, 26079.

[74] *See id.* at 26079.

[75] The Commission has previously considered and rejected similar arguments about the valuation of bitcoin according to a benchmark or reference price. *See, e.g.,* SolidX Order, 82 FR at 16258; Winklevoss Order, 83 FR at 37587–90; USBT Order, 85 FR at 12599–601.

[76] *See supra* notes 57–59 and accompanying text.

[77] *See* USBT Order, 85 FR at 12601.

[78] *See* Registration Statement at 30.

[79] *See id.* at 14.

[80] *See* USBT Order, 85 FR at 12601 n.66; *see also id.* at 12607.

[81] *See* WisdomTree Order, 86 FR at 69327.

[82] *See* USBT Order, 85 FR at 12607.

[83] *See also id.* at 12603–05.

[84] *See* 15 U.S.C. 78f(b)(5).

[85] 17 CFR 240.19b–4(a)(6)(i).

[86] Section 6 of the Exchange Act, 15 U.S.C. 78f, requires national securities exchanges to register with the Commission and requires an exchange's registration to be approved by the Commission, and Section 19(b) of the Exchange Act, 15 U.S.C. 78s(b), requires national securities exchanges to file proposed rules changes with the Commission and provides the Commission with the authority to disapprove proposed rule changes that are not consistent with the Exchange Act. Designated contract markets (''DCMs'') (commonly called ''futures markets'') registered with and regulated by the CFTC must comply with, among other things, a similarly comprehensive range of regulatory principles and must file rule changes with the CFTC. *See, e.g.,* Designated Contract Markets (DCMs), CFTC, *available at https://www.cftc.gov/IndustryOversight/TradingOrganizations/DCMs/index.htm.*

[87] *See* Winklevoss Order, 83 FR at 37597.

[88] *See* 15 U.S.C. 78e, 78f.

compliance policies, such requirements are fundamentally different from the Exchange Act's requirements for national securities exchanges.[89]

NYSE Arca's further assertions regarding CFTC's enforcement authority with respect to the Constituent Bitcoin Platforms also do not establish a level of oversight sufficient to dispense with the requisite surveillance-sharing agreement. While the Commission recognizes that the CFTC maintains some jurisdiction over the bitcoin spot market, under the Commodity Exchange Act, the CFTC does not have regulatory authority over bitcoin spot trading platforms, including the Constituent Bitcoin Platforms.[90] Except in certain limited circumstances, bitcoin spot trading platforms are not required to register with the CFTC, and the CFTC does not set standards for, approve the rules of, examine, or otherwise regulate bitcoin spot markets.[91] As the CFTC itself stated, while the CFTC ''has an important role to play,'' U.S. law ''does not provide for direct, comprehensive Federal oversight of underlying Bitcoin or virtual currency spot markets.'' [92]

Further, although NYSE Arca states that the Constituent Bitcoin Platforms must cooperate with inquiries and investigations of regulators and the Benchmark Administrator, it does not describe the scope of such requirements or what authority the Benchmark Administrator or regulators would have to compel the platforms'' cooperation. And while NYSE Arca asserts that the CME has in place information-sharing agreements with the Constituent Bitcoin Platforms, it does not provide any information on the scope, terms, or enforcement authority for such agreements. Nor has NYSE Arca put any information in the record as to whether and how it would use or enforce such agreements. Moreover, such agreements are contractual in nature and do not satisfy the regulatory requirements or purposes of national securities exchanges and the Exchange Act. The CME (and the CFTC, as discussed above) does not have regulatory authority over the spot bitcoin trading platforms,[93] and, while the CME is regulated by the CFTC, the CFTC's regulations do not extend to the Constituent Bitcoin Platforms by virtue of such contractual agreements.

While NYSE Arca asserts the Benchmark Administrator oversees the integrity of the Index, the oversight by the Benchmark Administrator does not represent a unique measure to resist manipulation beyond mechanisms that exist in securities or commodities markets. Other commodity-based and equity index ETPs approved by the Commission for listing and trading utilize reference rates or indices administered by similar benchmark administrators,[94] and the Commission has not, in those instances, dispensed with the need for a surveillance-sharing agreement with a significant regulated market.[95] For the same reason, even if, as the Exchange claims, there is no evidence that the Index has been subject to manipulation or that the Benchmark Administrator ever failed to maintain processes and controls to prevent manipulation by its organization, such lack of evidence is not a basis for the Commission to disregard the need for a surveillance-sharing agreement.

Moreover, the Benchmark Administrator does not itself exercise governmental regulatory authority. Rather, the Benchmark Administrator is a registered, privately-held company in England.[96] The Benchmark Administrator's relationship with the Constituent Bitcoin Platforms is based on their participation in the determination of reference rates, such as the Index. While the Benchmark Administrator is regulated by the UK FCA as a benchmark administrator, the UK FCA's regulations do not extend to the Constituent Bitcoin Platforms by virtue of their trade prices serving as input data underlying the Index.[97]

Further, the oversight performed by the Benchmark Administrator of the Constituent Bitcoin Platforms is for the purpose of ensuring the accuracy and integrity of the Index.[98] Such oversight serves a fundamentally different purpose as compared to the regulation of national securities exchanges and the requirements of the Exchange Act. Likewise, while the Exchange states that the CME participates in an oversight committee for the Index, the purpose of such committee is to ensure that the Index continues to accurately track the spot prices of bitcoin. While the Commission recognizes that these oversight functions may be important in ensuring the integrity of the Index, such requirements do not imbue either the Benchmark Administrator, the CME with respect to the Constituent Bitcoin Platforms, or the Constituent Bitcoin Platforms themselves, with regulatory authority similar to that the Exchange Act confers upon self-regulatory organizations such as national securities exchanges.[99]

Finally, the Exchange does not sufficiently explain the significance of the Index's purported resistance to manipulation to the overall analysis of whether the proposal to list and trade the Shares is designed to prevent fraud and manipulation. The Index is used by the Trust to value its bitcoin and to calculate its NAV. However, the Shares would trade at market-based prices in the secondary market, not at NAV.

In sum, none of NYSE Arca's assertions suggests that other means to prevent fraud and manipulation are sufficient to justify dispensing with the requisite surveillance-sharing agreement. Importantly, even if NYSE Arca had provided evidence to establish its assertions addressed above regarding the robustness of the Index methodology and framework and the regulation and oversight of the Constituent Bitcoin Platforms and Index, such assertions would render the proposed ETP no

[89] *See* USBT Order, 85 FR at 12603. The Commission has previously concluded that such AML and KYC policies and procedures do not serve as a substitute for, and are not otherwise dispositive in the analysis regarding the importance of having a surveillance-sharing agreement with a regulated market of significant size relating to bitcoin. For example, AML and KYC policies and procedures do not substitute for the sharing of information about market trading activity or clearing activity and do not substitute for regulation of a national securities exchange. See id. at 12603 n.101.

[90] *See id.* at 12604.

[91] *See id.*

[92] *See* Winklevoss Order, 83 FR at 37599 n.288.

[93] *See supra* notes 90–92 and accompanying text.

[94] *See, e.g.,* Securities Exchange Act Release Nos. 80840 (June 1, 2017) 82 FR 26534 (June 7, 2017) (SR–NYSEArca–2017–33) (approving the listing and trading of shares of exchange traded funds seeking to track the Solactive GLD EUR Gold Index, Solactive GLD GBP Gold Index, and the Solactive GLD JPY Gold Index); and 83046 (Apr. 13, 2018) 83 FR 17462 (Apr. 19, 2018) (SR–Nasdaq–2018–012) (approving the listing and trading of shares of an exchange-traded fund that seeks to track an equity index, the CBOE Russell 2000 30–Delta BuyWrite V2 Index).

[95] *See* USBT Order, 85 FR at 12605. *See also supra* note 19.

[96] *See https://blog.cfbenchmarks.com/legal/* (stating that the Benchmark Administrator is authorized and regulated by the UK Financial Conduct Authority (''UK FCA'') as a registered Benchmark Administrator (FRN 847100) under the EU benchmark regulation, and further noting that the Benchmark Administrator is a member of the Crypto Facilities group of companies which is in turn a member of the Payward, Inc. group of companies, and Payward, Inc. is the owner and operator of the Kraken Exchange, a venue that facilitates the trading of cryptocurrencies). The Commission notes that the Kraken is one of the Constituent Bitcoin Platforms underlying the Index.

[97] *See* USBT Order, 85 FR at 12604. The Benchmark Administrator is also not required to apply certain provisions of EU benchmark regulation to the Constituent Bitcoin Platforms because the Reference Rate's input data is not ''contributed.'' *See* Benchmark Statement, at 5 *available at https://docs-cfbenchmarks.s3.amazonaws.com/CME+CF+Benchmark+Statement.pdf.*

[98] *See* Notice, 86 FR at 26077 (''. . . an oversight function is implemented by the Benchmark Administrator in seeking to ensure that the Index is administered through codified policies for Index integrity.'').

[99] *See* 15 U.S.C. 78f(b).

more resistant to manipulation than derivative products based on traditional commodities or securities markets.[100] Thus, the record does not establish that NYSE Arca may satisfy Section 6(b)(5) of the Exchange Act without entering into a surveillance-sharing agreement with a regulated market of significant size.

(2) *Assertions Relating to Surveillance-Sharing Agreements*

As NYSE Arca has not demonstrated that other means besides surveillance-sharing agreements will be sufficient to prevent fraudulent and manipulative acts and practices, the Commission next examines whether the record supports the conclusion that NYSE Arca has entered into a comprehensive surveillance-sharing agreement with a regulated market of significant size relating to the underlying assets. In this context, the term ''market of significant size'' includes a market (or group of markets) as to which (i) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to successfully manipulate the ETP, so that a surveillance-sharing agreement would assist in detecting and deterring misconduct, and (ii) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.[101]

However, NYSE Arca does not identify any market as a ''market of significant size'' and accordingly makes no assertions regarding, and provides no information to establish, either prong of the ''market of significant size'' determination.

The requirements of Section 6(b)(5) of the Exchange Act apply to the rules of national securities exchanges. Accordingly, the relevant obligation for a comprehensive surveillance-sharing agreement with a regulated market of significant size, or other means to prevent fraudulent and manipulative acts and practices that are sufficient to justify dispensing with the requisite surveillance-sharing agreement, resides with the listing exchange. Because there is insufficient evidence in the record demonstrating that NYSE Arca has satisfied this obligation, the Commission cannot approve the proposed ETP for listing and trading on NYSE Arca.

C. Whether NYSE Arca Has Met Its Burden to Demonstrate That the Proposal Is Designed To Protect Investors and the Public Interest

NYSE Arca contends that, if approved, the proposed ETP would protect investors and the public interest. However, the Commission must consider these potential benefits in the broader context of whether the proposal meets each of the applicable requirements of the Exchange Act.[102] Because NYSE Arca has not demonstrated that its proposed rule change is designed to prevent fraudulent and manipulative acts and practices, the Commission must disapprove the proposal.

NYSE Arca asserts that the Trust will provide investors with exposure to bitcoin in a manner that is more efficient and convenient than the purchase of stand-alone bitcoin, while also mitigating some of the risk by reducing the volatility typically associated with the purchase of stand-alone bitcoin and without the uncertain and often complex requirements relating to acquiring and/or holding bitcoin.[103] NYSE Arca concludes that the manipulation concerns previously articulated by the Commission are mitigated by investor protection issues.[104]

In essence, NYSE Arca asserts that the risky nature of a direct investment in the underlying bitcoin compels approval of the proposed rule change. The Commission disagrees. Pursuant to Section 19(b)(2) of the Exchange Act, the Commission must approve a proposed rule change filed by a national securities exchange if it finds that the proposed rule change is consistent with the applicable requirements of the Exchange Act—including the requirement under Section 6(b)(5) that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices—and it must disapprove the filing if it does not make such a finding.[105] Thus, even if a proposed rule change purports to protect investors from a particular type of investment risk—such as complexity to acquire and/or hold the underlying asset—the proposed rule change may still fail to meet the requirements under the Exchange Act.[106]

Here, even if it were true that, compared to trading in unregulated bitcoin spot markets, trading a bitcoin-based ETP on a national securities exchange provides some additional protection to investors, the Commission must consider this potential benefit in the broader context of whether the proposal meets each of the applicable requirements of the Exchange Act.[107] As explained above, for bitcoin-based ETPs, the Commission has consistently required that the listing exchange have a comprehensive surveillance-sharing agreement with a regulated market of significant size related to bitcoin, or demonstrate that other means to prevent fraudulent and manipulative acts and practices are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The listing exchange has not met that requirement here. Therefore, the Commission is unable to find that the proposed rule change is consistent with the statutory standard.

Pursuant to Section 19(b)(2) of the Exchange Act, the Commission must disapprove a proposed rule change filed by a national securities exchange if it does not find that the proposed rule change is consistent with the applicable requirements of the Exchange Act—including the requirement under Section 6(b)(5) that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices.[108]

For the reasons discussed above, NYSE Arca has not met its burden of demonstrating that the proposal is consistent with Exchange Act Section 6(b)(5),[109] and, accordingly, the Commission must disapprove the proposal.[110]

D. Other Comments

Comment letters address the general nature and value of bitcoin;[111] the inherent value of, and risks of investing

[100] See USBT Order, 85 FR at 12599.

[101] *See* Winklevoss Order, 83 FR at 37594. This definition is illustrative and not exclusive. There could be other types of ''significant markets'' and ''markets of significant size,'' but this definition is an example that provides guidance to market participants. *See id.*

[102] *See id.* at 37601. *See also* GraniteShares Order, 83 FR at 43931; ProShares Order, 83 FR at 43941; USBT Order, 85 FR at 12615.

[103] *See* Notice, 86 FR at 26073.

[104] *See id.* at 26078.

[105] *See* Exchange Act Section 19(b)(2)(C), 15 U.S.C. 78s(b)(2)(C).

[106] *See* SolidX Order, 82 FR at 16259; WisdomTree Order, 86 FR at 69334.

[107] *See supra* note 102.

[108] *See* 15 U.S.C. 78s(b)(2)(C).

[109] 15 U.S.C. 78f(b)(5).

[110] In disapproving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f). A commenter argues, for efficiency reasons, against approving a bitcoin ETP. This commenter asserts that the adoption of multiple digital assets would force merchants to deal with ''complexity [that] doesn't foster [the] modularity which is needed to gain economic efficiency.'' *See* JC Letter at 1. For the reasons discussed throughout, however, see supra note 40, the Commission is disapproving the proposed rule change because it does not find that the proposed rule change is consistent with the Exchange Act. *See also* USBT Order, 85 FR at 12615.

[111] *See* JC Letter; letter from Sam Ahn, dated May 26, 2021 (''Ahn Letter'').

in, bitcoin;[112] the potential impact of Commission approval of bitcoin ETPs on the U.S. economy and financial system;[113] and the retirement investment risks of a bitcoin ETP.[114] Ultimately, however, additional discussion of these topics is unnecessary, as they do not bear on the basis for the Commission's decision to disapprove the proposal.

IV. Conclusion

For the reasons set forth above, the Commission does not find, pursuant to Section 19(b)(2) of the Exchange Act, that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, with Section 6(b)(5) of the Exchange Act.

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act, that proposed rule change SR–NYSEArca–2021–31 be, and hereby is, disapproved.

By the Commission.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2021–28254 Filed 12–28–21; 8:45 am]

BILLING CODE 8011–01–P

[112] *See* JC Letter; Ahn Letter.

[113] *See* JC Letter.

[114] *See id.*

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93853; File No. SR–Phlx–2021–75]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Expiration Date of the Temporary Amendments Concerning Video Conference Hearings

December 22, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 17, 2021, Nasdaq PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as constituting a ''non-controversial'' rule change under paragraph (f)(6) of Rule 19b–4 under the Act,[3] which renders the proposal effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the expiration date of the temporary amendments in SR–Phlx–2020–53 from December 31, 2021, to March 31, 2022.[4] The proposed rule change would not make any changes to the text of the Exchange rules.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/phlx/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to continue to harmonize Exchange Rule General 3, Section 16 with recent changes by the Financial Industry Regulatory Authority, Inc. (''FINRA'') to its Rule 1015 in response to the COVID–19 global health crisis and the corresponding need to restrict in-person activities.[5] The Exchange originally filed proposed rule change SR–Phlx–2020–53, which allows the Exchange Review Council (''ERC'') to conduct hearings in connection with appeals of Membership Application Program decisions, on a temporary basis, by video conference, if warranted by the current COVID–19-related public health risks posed by an in-person hearing. In August 2021, the Exchange filed a proposed rule change, SR–Phlx–2021–49, to extend the expiration date of the temporary amendments in SR–Phlx–2020–53 from August 31, 2021, to December 31, 2021.[6] While there are signs of improvement, much uncertainty remains for the coming months. The presence of the Delta variant, dissimilar vaccination rates throughout the United States, and the uptick in transmissions in many locations indicate that COVID–19 remains an active and real public health concern.[7] Due to the uncertainty and the lack of a clear timeframe for a sustained and widespread abatement of COVID–19-related health concerns and corresponding restrictions,[8] the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] If the Exchange seeks to provide additional temporary relief from the rule requirements identified in this proposed rule change beyond March 31, 2022, the Exchange will submit a separate rule filing to further extend the temporary extension of time. The amended Exchange rules will revert to their original form at the conclusion of the temporary relief period and any extension thereof.

[5] *See* Securities Exchange Act Release No. 93758 (December 13, 2021) (SR–FINRA–2021–031) (''FINRA Filing''). The Exchange notes that the FINRA Filing also proposed to temporarily amend FINRA Rules 9261, 9524, and 9830, which govern hearings in connection with appeals of disciplinary actions, eligibility proceedings, and temporary and permanent cease and desist orders. The Exchange's Rules 9261, 9524, and 9830 incorporate by reference The Nasdaq Stock Market LLC rules, which are the subject of a separate filing. *See* SR–NASDAQ–2021–104. Therefore, the Exchange is not proposing to adopt that aspect of the FINRA Filing.

[6] *See* Securities Exchange Act Release No. 92906 (September 9, 2021), 86 FR 51404 (September 15, 2021) (Notice of Filing and Immediate Effectiveness of File No. SR–Phlx–2021–49); *see also* Securities Exchange Act Release No. 90758 (December 21, 2020), 85 FR 85782 (December 29, 2020) (Notice of Filing and Immediate Effectiveness of File No. SR–Phlx–2020–053).

[7] For example, President Joe Biden on July 29, 2021, announced several measures to increase the number of people vaccinated against COVID–19 and to slow the spread of the Delta variant, including strengthening safety protocols for federal government employees and contractors. *See https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/29/fact-sheet-president-biden-to-announce-new-actions-to-get-more-americans-vaccinated-and-slow-the-spread-of-the-delta-variant/.* Thereafter, the Biden Administration announced on November 4, 2021, details of two major vaccination policies to further help fight COVID–19. *See https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/04/fact-sheet-biden-administration-announces-details-of-two-major-vaccination-policies/.* Most recently, President Biden announced several new actions to help protect Americans against the Delta and Omicron variants. *See https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/02/fact-sheet-president-biden-announces-new-actions-to-protect-americans-against-the-delta-and-omicron-variants-as-we-battle-covid-19-this-winter/.*

[8] For instance, the Centers for Disease Control and Prevention (''CDC'') recently announced that the first confirmed case of COVID–19 caused by the Omicron variant was detected in the United States. *See https://www.cdc.gov/media/releases/2021/s1201-omicron-variant.html.* The CDC also recommends that fully vaccinated people wear a mask in public indoor settings in areas of substantial or high transmission and noted that fully vaccinated people might choose to wear a

Exchange believes that there is a continued need for temporary relief beyond December 31, 2021. Accordingly, the Exchange proposes to extend the expiration date of the temporary rule amendments in SR–Phlx–2020–53 from December 31, 2021, to March 31, 2022.

As set forth in SR–Phlx–2020–53, the Exchange also relies on COVID–19 data and criteria to determine whether the current public health risks presented by an in-person hearing may warrant a hearing by video conference. Based on that data and criteria, the Exchange does not believe the COVID–19-related health concerns necessitating this relief will meaningfully subside by December 31, 2021, and believes that there will be a continued need for this temporary relief beyond that date. Accordingly, the Exchange proposes to extend the expiration date of the temporary rule amendments originally set forth in SR–Phlx–2020–53 from December 31, 2021, to March 31, 2022. The extension of the temporary amendments allowing for specified ERC hearings to proceed by video conference will allow the Exchange's critical adjudicatory functions to continue to operate effectively in these extraordinary circumstances—enabling the Exchange to fulfill its statutory obligations to protect investors and maintain fair and orderly markets—while also protecting the health and safety of hearing participants.

The Exchange has filed the proposed rule change for immediate effectiveness and has requested that the SEC waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing, so the Exchange can implement the proposed rule change immediately.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Section 6(b)(5) of the Act,[10] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest, by providing greater harmonization between the Exchange rules and FINRA rules of similar purpose,[11] resulting in less burdensome and more efficient regulatory compliance.

The proposed rule change, which extends the expiration date of the temporary amendments to the Exchange rules set forth in SR–Phlx–2020–53, will continue to aid the Exchange's efforts to timely conduct hearings in connection with its core adjudicatory functions. Given the current and frequently changing COVID–19 conditions and the uncertainty around when those conditions will see meaningful, widespread and sustained improvement, without this relief allowing ERC hearings to proceed by video conference, the Exchange might be required to postpone some or almost all hearings indefinitely. The Exchange must be able to perform its critical adjudicatory functions to fulfill its statutory obligations to protect investors and maintain fair and orderly markets. As such, this relief is essential to the Exchange's ability to fulfill its statutory obligations and allows hearing participants to avoid the serious COVID–19-related health and safety risks associated with in-person hearings.

Among other things, this relief will allow the ERC to timely provide members, disqualified individuals and other applicants an approval or denial of their applications. As set forth in detail in SR–Phlx–2020–53, this temporary relief allowing ERC hearings to proceed by video conference accounts for fair process considerations and will continue to provide fair process while avoiding the COVID–19-related public health risks for hearing participants. Accordingly, the proposed rule change extending this temporary relief is in the public interest and consistent with the Act's purpose.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the temporary proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. As set forth in SR–Phlx–2020–53, the proposed rule change is intended solely to extend temporary relief necessitated by the continued impacts of the COVID–19 outbreak and the related health and safety risks of conducting in-person activities. The Exchange believes that the proposed rule change will prevent unnecessary impediments to its operations, including its critical adjudicatory processes, and its ability to fulfill its statutory obligations to protect investors and maintain fair and orderly markets that would otherwise result if the temporary amendments were to expire on December 31, 2021.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act[12] and subparagraph (f)(6) of Rule 19b–4 thereunder.[13]

A proposed rule change filed under Rule 19b–4(f)(6)[14] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[15] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange has indicated that the proposed rule change to extend the expiration date will continue to prevent unnecessary impediments to its operations, including its critical adjudicatory processes, and its ability to fulfill its statutory obligations to protect investors and maintain fair and orderly markets that would otherwise result if the temporary amendments were to expire on December 31, 2021.[16]

mask regardless of the level of transmission, particularly if they are immunocompromised or at increased risk for severe disease from COVID–19. *See https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html*. Furthermore, numerous states currently have COVID–19 restrictions in place. Six states (Hawaii, Illinois, Nevada, New Mexico, Oregon, and Washington) require most people to wear masks in indoor public places regardless of vaccination status, and three states (California, Connecticut, and New York) have mask mandates in indoor public places for those individuals who are unvaccinated. Several other states have mask mandates in certain settings, such as healthcare facilities, schools, and correctional facilities.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] *See supra* note 5.

[12] 15 U.S.C. 78s(b)(3)(A)(iii).

[13] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[14] 17 CFR 240.19b–4(f)(6).

[15] 17 CFR 240.19b–4(f)(6)(iii).

[16] *See supra* Item II.

Importantly, the Exchange has also stated that extending the temporary relief provided in SR–Phlx–2020–53 immediately upon filing and without a 30-day operative delay will allow the Exchange to continue critical adjudicatory and review processes in a reasonable and fair manner and meet its critical investor protection goals, while also following best practices with respect to the health and safety of its employees.[17] The Commission also notes that this proposal extends without change the temporary relief previously provided by SR–Phlx–2020–53.[18] As proposed, the temporary changes would be in place through March 31, 2022 and the amended rules will revert back to their original state at the conclusion of the temporary relief period and, if applicable, any extension thereof.[19] For these reasons, the Commission believes that waiver of the 30-day operative delay for this proposal is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[20]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–Phlx–2021–75 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–Phlx–2021–75. 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/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2021–75 and should be submitted on or before January 19, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–28248 Filed 12–28–21; 8:45 am]

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[17] *See* FINRA Filing, 86 FR 71695, 71696 (noting the same in granting FINRA's request to waive the 30-day operative delay so that SR–FINRA–2021–031 would become operative immediately upon filing).

[18] *See supra* note 6.

[19] *See supra* note 4. As noted above, the Exchange states that if it requires temporary relief from the rule requirements identified in this proposal beyond March 31, 2022, it may submit a separate rule filing to extend the effectiveness of the temporary relief under these rules.

[20] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[21] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93860; File No. SR–CboeBZX–2021–029]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Order Disapproving a Proposed Rule Change To List and Trade Shares of the Kryptoin Bitcoin ETF Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares

December 22, 2021.

I. Introduction

On April 9, 2021, Cboe BZX Exchange, Inc. (''BZX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares (''Shares'') of the Kryptoin Bitcoin ETF Trust (''Trust'') under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares. The proposed rule change was published for comment in the **Federal Register** on April 28, 2021.[3]

On June 9, 2021, pursuant to Section 19(b)(2) of the Exchange Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5] On July 23, 2021, the Commission instituted proceedings under Section 19(b)(2)(B) of the Exchange Act[6] to determine whether to approve or disapprove the proposed rule change.[7] On September 29, 2021, the Commission designated a longer period for Commission action on the proposed rule change.[8]

This order disapproves the proposed rule change. The Commission concludes that BZX has not met its burden under the Exchange Act and the Commission's Rules of Practice to demonstrate that its proposal is consistent with the requirements of Exchange Act Section 6(b)(5), and in particular, the requirement that the rules of a national

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 91646 (Apr. 22, 2021), 86 FR 22485 (''Notice''). Comments on the proposed rule change can be found at: *https://www.sec.gov/comments/sr-cboebzx-2021-029/srcboebzx2021029.htm*.

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 92131, 86 FR 31772 (June 15, 2021).

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release No. 92476, 86 FR 40883 (July 29, 2021).

[8] *See* Securities Exchange Act Release No. 93175, 86 FR 55092 (Oct. 5, 2021).

securities exchange be ''designed to prevent fraudulent and manipulative acts and practices'' and ''to protect investors and the public interest.'' [9]

When considering whether BZX's proposal to list and trade the Shares is designed to prevent fraudulent and manipulative acts and practices, the Commission applies the same standard used in its orders considering previous proposals to list bitcoin [10]-based commodity trusts and bitcoin-based trust issued receipts.[11] As the Commission has explained, an exchange that lists bitcoin-based exchange-traded products (''ETPs'') can meet its obligations under Exchange Act Section 6(b)(5) by demonstrating that the exchange has a comprehensive surveillance-sharing agreement with a regulated market of significant size related to the underlying or reference bitcoin assets.[12]

The standard requires such surveillance-sharing agreements since they ''provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.'' [13] The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance-sharing agreement with markets trading the underlying assets for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules.[14] The hallmarks of a surveillance-sharing agreement are that the agreement provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party.[15]

In the context of this standard, the terms ''significant market'' and ''market of significant size'' include a market (or group of markets) as to which (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to successfully manipulate the ETP, so that a surveillance-sharing agreement would assist in detecting and deterring misconduct, and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.[16] A surveillance-sharing agreement must be entered into with a ''significant market'' to assist in detecting and deterring manipulation of the ETP, because a person attempting to manipulate the ETP is reasonably likely to also engage in trading activity on that ''significant market.'' [17]

Consistent with this standard, for the commodity-trust ETPs approved to date for listing and trading, there has been in *every* case at least one significant, regulated market for trading futures on the underlying commodity—whether gold, silver, platinum, palladium, or copper—and the ETP listing exchange has entered into surveillance-sharing agreements with, or held Intermarket Surveillance Group (''ISG'') membership in common with, that market.[18] Moreover, the surveillance-sharing agreements have been consistently present whenever the Commission has approved the listing and trading of derivative securities, even where the underlying securities were also listed on national securities exchanges—such as options based on an index of stocks traded on a national securities exchange—and were thus subject to the Commission's direct regulatory authority.[19]

[9] 15 U.S.C. 78f(b)(5).

[10] Bitcoins are digital assets that are issued and transferred via a decentralized, open-source protocol used by a peer-to-peer computer network through which transactions are recorded on a public transaction ledger known as the ''bitcoin blockchain.'' The bitcoin protocol governs the creation of new bitcoins and the cryptographic system that secures and verifies bitcoin transactions. *See, e.g.,* Notice, 86 FR at 22485.

[11] *See* Order Setting Aside Action by Delegated Authority and Disapproving a Proposed Rule Change, as Modified by Amendments No. 1 and 2, To List and Trade Shares of the Winklevoss Bitcoin Trust, Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (Aug. 1, 2018) (SR–BatsBZX–2016–30) (''Winklevoss Order''); Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, To Amend NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares) and To List and Trade Shares of the United States Bitcoin and Treasury Investment Trust Under NYSE Arca Rule 8.201–E, Securities Exchange Act Release No. 88284 (Feb. 26, 2020), 85 FR 12595 (Mar. 3, 2020) (SR–NYSEArca–2019–39) (''USBT Order''); Order Disapproving a Proposed Rule Change To List and Trade Shares of the WisdomTree Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 93700 (Dec. 1, 2021), 86 FR 69322 (Dec. 7, 2021) (SR–CboeBZX–2021–024) (''WisdomTree Order''). *See also* Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, Relating to the Listing and Trading of Shares of the SolidX Bitcoin Trust Under NYSE Arca Equities Rule 8.201, Securities Exchange Act Release No. 80319 (Mar. 28, 2017), 82 FR 16247 (Apr. 3, 2017) (SR–NYSEArca–2016–101) (''SolidX Order''). The Commission also notes that orders were issued by delegated authority on the following matters: Order Disapproving a Proposed Rule Change To List and Trade the Shares of the ProShares Bitcoin ETF and the ProShares Short Bitcoin ETF, Securities Exchange Act Release No. 83904 (Aug. 22, 2018), 83 FR 43934 (Aug. 28, 2018) (SR–NYSEArca–2017–139) (''ProShares Order''); Order Disapproving a Proposed Rule Change To List and Trade the Shares of the GraniteShares Bitcoin ETF and the GraniteShares Short Bitcoin ETF, Securities Exchange Act Release No. 83913 (Aug. 22, 2018), 83 FR 43923 (Aug. 28, 2018) (SR–CboeBZX–2018–001) (''GraniteShares Order''); Order Disapproving a Proposed Rule Change To List and Trade Shares of the VanEck Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 93559 (Nov. 12, 2021), 86 FR 64539 (Nov. 18, 2021) (SR–CboeBZX–2021–019).

[12] *See* USBT Order, 85 FR at 12596. *See also* Winklevoss Order, 83 FR at 37592 n.202 and accompanying text (discussing previous Commission approvals of commodity-trust ETPs); GraniteShares Order, 83 FR at 43925–27 nn.35–39 and accompanying text (discussing previous Commission approvals of commodity-futures ETPs).

[13] *See* Amendment to Rule Filing Requirements for Self-Regulatory Organizations Regarding New Derivative Securities Products, Securities Exchange Act Release No. 40761 (Dec. 8, 1998), 63 FR 70952, 70959 (Dec. 22, 1998) (''NDSP Adopting Release''). *See also* Winklevoss Order, 83 FR at 37594; ProShares Order, 83 FR at 43936; GraniteShares Order, 83 FR at 43924; USBT Order, 85 FR at 12596.

[14] *See* NDSP Adopting Release, 63 FR at 70959.

[15] *See* Winklevoss Order, 83 FR at 37592–93; Letter from Brandon Becker, Director, Division of Market Regulation, Commission, to Gerard D. O'Connell, Chairman, Intermarket Surveillance Group (June 3, 1994), *available at https://www.sec.gov/divisions/marketreg/mr-noaction/isg060394.htm.*

[16] *See* Winklevoss Order, 83 FR at 37594. This definition is illustrative and not exclusive. There could be other types of ''significant markets'' and ''markets of significant size,'' but this definition is an example that will provide guidance to market participants. *See id.*

[17] *See* USBT Order, 85 FR at 12597.

[18] *See* Winklevoss Order, 83 FR at 37594.

[19] *See* USBT Order, 85 FR at 12597; Securities Exchange Act Release No. 33555 (Jan. 31, 1994), 59 FR 5619, 5621 (Feb. 7, 1994) (SR–Amex–93–28) (order approving listing of options on American Depository Receipts (''ADRs'')). The Commission has also required a surveillance-sharing agreement in the context of index options even when (i) all of the underlying index component stocks were either registered with the Commission or exempt from registration under the Exchange Act; (ii) all of the underlying index component stocks traded in the U.S. either directly or as ADRs on a national securities exchange; and (iii) effective international ADR arbitrage alleviated concerns over the relatively smaller ADR trading volume, helped to ensure that ADR prices reflected the pricing on the home market, and helped to ensure more reliable price determinations for settlement purposes, due to the unique composition of the index and reliance on ADR prices. *See* Securities Exchange Act Release No. 26653 (Mar. 21, 1989), 54 FR 12705, 12708 (Mar. 28, 1989) (SR–Amex–87–25) (stating that ''surveillance-sharing agreements between the exchange on which the index option trades and the markets that trade the underlying securities are necessary'' and that ''[t]he exchange of surveillance data by the exchange trading a stock index option and the markets for the securities comprising the index is important to the detection and deterrence of intermarket manipulation.''). And the Commission has required a surveillance-sharing agreement even when approving options based on an index of stocks traded on a national securities exchange. *See* Securities Exchange Act Release No. 30830 (June 18, 1992), 57 FR 28221, 28224 (June 24, 1992) (SR–Amex–91–22) (stating that surveillance-sharing agreements ''ensure the availability of information necessary to detect and deter potential manipulations and other trading abuses'').

Listing exchanges have also attempted to demonstrate that other means besides surveillance-sharing agreements will be sufficient to prevent fraudulent and manipulative acts and practices, including that the bitcoin market as a whole or the relevant underlying bitcoin market is ''uniquely'' and ''inherently'' resistant to fraud and manipulation.[20] In response, the Commission has agreed that, if a listing exchange could establish that the underlying market inherently possesses a unique resistance to manipulation beyond the protections that are utilized by traditional commodity or securities markets, it would not necessarily need to enter into a surveillance-sharing agreement with a regulated significant market.[21] Such resistance to fraud and manipulation, however, must be novel and beyond those protections that exist in traditional commodity markets or equity markets for which the Commission has long required surveillance-sharing agreements in the context of listing derivative securities products.[22] No listing exchange has satisfied its burden to make such demonstration.[23]

Here, BZX contends that approval of the proposal is consistent with Section 6(b)(5) of the Exchange Act, in particular Section 6(b)(5)'s requirement that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest.[24] As discussed in more detail below, BZX asserts that the proposal is consistent with Section 6(b)(5) of the Exchange Act because the Exchange has a comprehensive surveillance-sharing agreement with a regulated market of significant size,[25] and there exist other means to prevent fraudulent and manipulative acts and practices that are sufficient to justify dispensing with the requisite surveillance-sharing agreement.[26]

Although BZX recognizes the Commission's focus on potential manipulation of bitcoin ETPs in prior disapproval orders, BZX argues that such manipulation concerns have been sufficiently mitigated, and that the growing and quantifiable investor protection concerns should be the central consideration of the Commission.[27] Specifically, as discussed in more detail below, the Exchange asserts that the significant increase in trading volume in bitcoin futures on the Chicago Mercantile Exchange (''CME''), the growth of liquidity in the spot market for bitcoin, and certain features of the Shares and the Reference Rate (as defined herein) mitigate potential manipulation concerns to the point that the investor protection issues that have arisen from the rapid growth of over-the-counter (''OTC'') bitcoin funds, including premium/discount volatility and management fees, should be the central consideration as the Commission determines whether to approve this proposal.[28]

Further, BZX believes that the proposal would give U.S. investors access to bitcoin in a regulated and transparent exchange-traded vehicle that would act to limit risk to U.S. investors. According to BZX, the proposed listing and trading of the Shares would mitigate risk by: (i) Reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; (iii) reducing risks associated with investing in operating companies that are imperfect proxies for bitcoin exposure; and (iv) providing an alternative to custodying spot bitcoin.[29]

In the analysis that follows, the Commission examines whether the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act by addressing: In Section III.B.1 assertions that other means besides surveillance-sharing agreements will be sufficient to prevent fraudulent and manipulative acts and practices; in Section III.B.2 assertions that BZX has entered into a comprehensive surveillance-sharing agreement with a regulated market of significant size related to bitcoin; and in Section III.C assertions that the proposal is consistent with the protection of investors and the public interest. As discussed further below, BZX repeats various assertions made in prior bitcoin-based ETP proposals that the Commission has previously addressed and rejected—and more importantly, BZX does not respond to the Commission's reasons for rejecting those assertions but merely repeats them. The Commission concludes that BZX has not established that other means to prevent fraudulent and manipulative acts and practices are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Commission further concludes that BZX has not established that it has a comprehensive surveillance-sharing agreement with a regulated market of significant size related to bitcoin. As a result, the Commission is unable to find that the proposed rule change is consistent with the statutory requirements of Exchange Act Section 6(b)(5).

The Commission again emphasizes that its disapproval of this proposed rule change does not rest on an evaluation of whether bitcoin, or blockchain technology more generally, has utility or value as an innovation or an investment. Rather, the Commission is disapproving this proposed rule change because, as discussed below, BZX has not met its burden to demonstrate that its proposal is consistent with the requirements of Exchange Act Section 6(b)(5).

II. Description of the Proposed Rule Change

As described in more detail in the Notice,[30] the Exchange proposes to list and trade the Shares of the Trust under BZX Rule 14.11(e)(4), which governs the listing and trading of Commodity-Based Trust Shares on the Exchange.[31]

The investment objective of the Trust is to provide exposure to bitcoin at a price that is reflective of the actual bitcoin market where investors purchase and sell bitcoin, less the expense of the Trust's operations.[32] The Trust would hold bitcoin, and it would calculate the Trust's net asset value (''NAV'') daily based on the value of bitcoin as reflected by the CF Bitcoin U.S. Settlement Price (''Reference Rate''). The administrator of the Reference Rate is CF Benchmarks Ltd. (''Benchmark Administrator''). The Reference Rate aggregates the trade flow of several bitcoin spot platforms. The current platform composition of the Reference

[20] *See* USBT Order, 85 FR at 12597.

[21] *See* Winklevoss Order, 83 FR at 37580, 37582–91 (addressing assertions that ''bitcoin and bitcoin [spot] markets'' generally, as well as one bitcoin trading platform specifically, have unique resistance to fraud and manipulation); *see also* USBT Order, 85 FR at 12597.

[22] *See* USBT Order, 85 FR at 12597.

[23] *See* supra note 11.

[24] *See* Notice, 86 FR at 22495.

[25] *See id.* at 22491–92.

[26] *See id.* at 22492.

[27] *See id.* at 22487–88, 22491, 22495–96.

[28] *See id.* at 22491, 22495.

[29] *See id.* at 22487.

[30] *See* Notice, *supra* note 3. *See also* Amendment No. 2 to Registration Statement on Form S–1, dated April 9, 2021, submitted to the Commission by Kryptoin Investment Advisors, LLC (''Sponsor'') on behalf of the Trust (''Registration Statement'').

[31] Although the name of the Trust is the Kryptoin Bitcoin ETF Trust, the Trust is a commodity-based ETP. The Trust is not an exchange-traded fund, *i.e.,* an ''ETF,'' registered under the Investment Company Act of 1940, as amended (''1940 Act''), and is not subject to regulation under the 1940 Act.

[32] Delaware Trust Company is the trustee, and The Bank of New York Mellon will be the administrator (''Administrator'') and transfer agent. Foreside Fund Services, LLC will be the marketing agent in connection with the creation and redemption of ''baskets'' of Shares, and the Sponsor will provide assistance in the marketing of the Shares. Gemini Trust Company, LLC, a third-party custodian (''Custodian''), will be responsible for custody of the Trust's bitcoin. *See* Notice, 86 FR at 22485, 22492–93.

Rate is Bitstamp, Coinbase, Gemini, itBit, and Kraken. In calculating the Reference Rate, the methodology creates a joint list of certain trade prices and sizes from the constituent platforms between 3:00 p.m. E.T. and 4:00 p.m. E.T. The methodology then divides this list into 12 equally-sized time intervals of five minutes, and it calculates the volume-weighted median trade price for each of those time intervals.[33] The Reference Rate is the arithmetic mean of these 12 volume-weighted median trade prices.[34]

Each Share represents a fractional undivided beneficial interest in the bitcoin held by the Trust. The Trust's assets will consist of bitcoin held by the Custodian on behalf of the Trust. The Trust generally does not intend to hold cash or cash equivalents. However, there may be situations where the Trust will unexpectedly hold cash on a temporary basis.[35]

The Administrator will determine the NAV and NAV per Share of the Trust on each day that the Exchange is open for regular trading, after 4:00 p.m. E.T. The NAV of the Trust is the aggregate value of the Trust's assets less its liabilities (which include estimated accrued but unpaid fees and expenses). In determining the Trust's NAV, the Administrator will value the bitcoin held by the Trust on the basis of the price of bitcoin as determined by the Reference Rate.[36]

The Trust will provide information regarding the Trust's bitcoin holdings, as well as an Intraday Indicative Value (''IIV'') per Share updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the Exchange's Regular Trading Hours (9:30 a.m. to 4:00 p.m. E.T.). The IIV will be calculated by using the prior day's closing NAV per Share as a base and updating that value during Regular Trading Hours to reflect changes in the value of the Trust's bitcoin holdings during the trading day.[37]

When the Trust sells or redeems its Shares, it will do so in ''in-kind'' transactions in blocks of 50,000 Shares. When creating the Shares, authorized participants will deliver, or facilitate the delivery of, bitcoin to the Trust's account with the Custodian in exchange for the Shares, and, when redeeming the Shares, the Trust, through the Custodian, will deliver bitcoin to such authorized participants.[38]

III. Discussion

A. The Applicable Standard for Review

The Commission must consider whether BZX's proposal is consistent with the Exchange Act. Section 6(b)(5) of the Exchange Act requires, in relevant part, that the rules of a national securities exchange be designed ''to prevent fraudulent and manipulative acts and practices'' and ''to protect investors and the public interest.'' [39] Under the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the self-regulatory organization ['SRO'] that proposed the rule change.'' [40]

The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,[41] and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the applicable rules and regulations.[42] Moreover, ''unquestioning reliance'' on an SRO's representations in a proposed rule change is not sufficient to justify Commission approval of a proposed rule change.[43]

B. Whether BZX Has Met Its Burden To Demonstrate That the Proposal Is Designed To Prevent Fraudulent and Manipulative Acts and Practices

(1) Assertions That Other Means Besides Surveillance-Sharing Agreements Will Be Sufficient To Prevent Fraudulent and Manipulative Acts and Practices

As stated above, the Commission has recognized that a listing exchange could demonstrate that other means to prevent fraudulent and manipulative acts and practices are sufficient to justify dispensing with a comprehensive surveillance-sharing agreement with a regulated market of significant size, including by demonstrating that the bitcoin market as a whole or the relevant underlying bitcoin market is uniquely and inherently resistant to fraud and manipulation.[44] Such resistance to fraud and manipulation must be novel and beyond those protections that exist in traditional commodities or securities markets.[45]

BZX asserts that bitcoin is resistant to price manipulation. According to BZX, the geographically diverse and continuous nature of bitcoin trading render it difficult and prohibitively costly to manipulate the price of bitcoin.[46] Fragmentation across bitcoin platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of bitcoin prices through continuous trading activity challenging.[47] To the extent that there are bitcoin platforms engaged in or allowing wash trading or other activity intended to manipulate the price of bitcoin on other markets, such pricing does not normally impact prices on other platforms because participants will generally ignore markets with

[33] According to BZX, the Reference Rate is based on materially the same methodology (except calculation time, as described herein) as the Benchmark Administrator's CME CF Bitcoin Reference Rate (''BRR''), which was first introduced on November 14, 2016, and is the rate on which bitcoin futures contracts are cash-settled in U.S. dollars on CME. The Reference Rate is calculated as of 4:00 p.m. E.T., whereas the BRR is calculated as of 4:00 p.m. London Time. The Reference Rate aggregates the trade flow of several bitcoin platforms, during an observation window between 3:00 p.m. and 4:00 p.m. E.T. into the U.S. dollar price of one bitcoin at 4:00 p.m. E.T. The current constituent bitcoin platforms of the Reference Rate are Bitstamp, Coinbase, Gemini, itBit, and Kraken (''Constituent Bitcoin Platforms''). *See id.* at 22493.

[34] *See id.*

[35] *See id.* at 22492.

[36] *See id.* at 22494.

[37] *See id.* at 22493.

[38] *See id.*

[39] 15 U.S.C. 78f(b)(5). Pursuant to Section 19(b)(2) of the Exchange Act, 15 U.S.C. 78s(b)(2), the Commission must disapprove a proposed rule change filed by a national securities exchange if it does not find that the proposed rule change is consistent with the applicable requirements of the Exchange Act. Exchange Act Section 6(b)(5) states that an exchange shall not be registered as a national securities exchange unless the Commission determines that ''[t]he rules of the exchange are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by this title matters not related to the purposes of this title or the administration of the exchange.'' 15 U.S.C. 78f(b)(5).

[40] Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

[41] *See id.*

[42] *See id.*

[43] *Susquehanna Int'l Group, LLP* v. *Securities and Exchange Commission*, 866 F.3d 442, 447 (D.C. Cir. 2017) (''Susquehanna'').

[44] *See* USBT Order, 85 FR at 12597 n.23. The Commission is not applying a ''cannot be manipulated'' standard. Instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met. *See id.*

[45] *See id.* at 12597.

[46] *See* Notice, 86 FR at 22491 n.55.

[47] *See id.*

quotes that they deem non-executable.[48] BZX further argues that the linkage between the bitcoin markets and the presence of arbitrageurs in those markets means that the manipulation of the price of bitcoin on any single venue would require manipulation of the global bitcoin price in order to be effective.[49] Arbitrageurs must have funds distributed across multiple trading platforms in order to take advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular bitcoin trading venue.[50] As a result, BZX concludes that the potential for manipulation on a bitcoin trading platform would require overcoming the liquidity supply of such arbitrageurs who are effectively eliminating any cross-market pricing differences.[51]

The Sponsor, in a comment letter, states that it agrees with the Exchange's assertion that the bitcoin spot market is resistant to price manipulation. The Sponsor asserts that the trading of bitcoin on hundreds of spot platforms in geographically diverse locations, the dispersed nature of market liquidity, and the level of capital necessarily deployed across these platforms render an attempted manipulation of the global bitcoin spot market ''challenging and highly unlikely, if not impossible.'' [52] The Sponsor further states that there exists a large presence of arbitrageurs in the form of automated market makers and high-frequency and algorithmic trading firms established to specifically seek profits by actively trading any temporary dislocations in the bitcoin price between trading venues, and that any attempt to manipulate the price of bitcoin where these firms are active would require exceeding the liquidity supply of these arbitrageurs that are effectively eliminating any cross-market pricing deviations.[53]

As with the previous proposals, the Commission here concludes that the record does not support a finding that the bitcoin market is inherently and uniquely resistant to fraud and manipulation. BZX and the Sponsor assert that, because of how bitcoin trades occur, including through continuous means and through fragmented platforms, arbitrage across the bitcoin platforms essentially helps to keep global bitcoin prices aligned with one another, thus hindering manipulation. Neither the Exchange nor the Sponsor, however, provides any data or analysis to support its assertions, either in terms of how closely bitcoin prices are aligned across different bitcoin trading venues or how quickly price disparities may be arbitraged away.[54] As stated above, ''unquestioning reliance'' on an SRO's representations in a proposed rule change is not sufficient to justify Commission approval of a proposed rule change.[55]

Efficient price arbitrage, moreover, is not sufficient to support the finding that a market is uniquely and inherently resistant to manipulation such that the Commission can dispense with surveillance-sharing agreements.[56] The Commission has stated, for example, that even for equity options based on securities listed on national securities exchanges, the Commission relies on surveillance-sharing agreements to detect and deter fraud and manipulation.[57] Here, neither the Exchange nor the Sponsor provides evidence to support its assertion of efficient price arbitrage across bitcoin platforms, let alone any evidence that price arbitrage in the bitcoin market is novel or unique so as to warrant the Commission dispensing with the requirement of a surveillance-sharing agreement. Moreover, neither the Exchange nor the Sponsor takes into account that a market participant with a dominant ownership position would not find it prohibitively expensive to overcome the liquidity supplied by arbitrageurs and could use dominant market share to engage in manipulation.[58]

In addition, the Exchange makes the unsupported claim that bitcoin prices on platforms with wash trades or other activity intended to manipulate the price of bitcoin do not influence the ''real'' price of bitcoin. The Exchange also asserts that, to the extent that there are bitcoin platforms engaged in or allowing wash trading or other manipulative activities, market participants will generally ignore those platforms.[59] However, without the necessary data or other evidence, the Commission has no basis on which to conclude that bitcoin platforms are insulated from prices of others that engage in or permit fraud or manipulation.[60]

Additionally, the continuous nature of bitcoin trading does not eliminate manipulation risk, and neither do linkages among markets, as BZX asserts.[61] Even in the presence of continuous trading or linkages among markets, formal (such as those with consolidated quotations or routing requirements) or otherwise (such as in the context of the fragmented, global bitcoin markets), manipulation of asset prices, as a general matter, can occur simply through trading activity that creates a false impression of supply or demand.[62]

BZX also argues that the significant liquidity in the bitcoin spot market and the impact of market orders on the overall price of bitcoin mean that attempting to move the price of bitcoin is costly and has grown more expensive over the past year.[63] According to BZX, in January 2020, for example, the cost to buy or sell $5 million worth of bitcoin averaged roughly 30 basis points (compared to 10 basis points in February 2021) with a market impact of 50 basis points (compared to 30 basis points in February 2021). For a $10 million market order, the cost to buy or

[48] *See id.*

[49] *See id.*

[50] *See id.*

[51] *See id.*

[52] *See* letter from Jason Toussaint, Chief Executive Officer, Kryptoin Investment Advisors, LLC, dated August 19, 2021 (''Kryptoin Letter''), at 3.

[53] *See id.* The Custodian, in a comment letter, states that it believes that certain of the Commission's historical concerns about the bitcoin markets are ameliorated by the growth of the overall bitcoin market and related growth of regulated bitcoin derivatives. *See* letter from Gemini Trust Company, LLC, dated August 19, 2021 (''Gemini Letter''), at 2. Another commenter, however, asserts that the bitcoin network is the preferred network for global criminals and is a pyramid scheme in which the top holders encourage existing holders to keep holding and entice new retail investors to invest. *See* letter from Maulik Patel, dated July 4, 2021 (''Patel Letter'').

[54] In addition, the Registration Statement states that bitcoin spot platforms are not subject to the same regulatory oversight as traditional equity exchanges, which could negatively impact the ability of authorized participants to implement arbitrage mechanisms. *See* Registration Statement at 22. *See also infra* note 69 and accompanying text (referencing statements made in the Registration Statement that contradict assertions made by BZX).

[55] *See supra* note 43.

[56] *See* Winklevoss Order, 83 FR at 37586; SolidX Order, 82 FR at 16256–57; USBT Order, 85 FR at 12601.

[57] *See, e.g.*, USBT Order, 85 FR at 12601.

[58] *See, e.g.*, Winklevoss Order, 83 FR at 37584; USBT Order, 85 FR at 12600–01. *See also* Registration Statement at 10 (stating that, as of the date of the Registration Statement, ''the largest 100 bitcoin wallets held a substantial amount of the outstanding supply of bitcoin and it is possible that some of these wallets are controlled by the same person or entity''; that ''it is possible that other persons or entities control multiple wallets that collectively hold a significant number of bitcoin, even if each wallet individually only holds a small amount''; and that ''[a]s a result of this concentration of ownership, large sales by such holders could have an adverse effect on the market price of bitcoin.'').

[59] *See* Notice, 86 FR at 22491 n.55.

[60] *See* USBT Order, 85 FR at 12601.

[61] *See* Winklevoss Order, 83 FR at 37585 n.92 and accompanying text.

[62] *See id.* at 37585.

[63] *See* Notice, 86 FR at 22492, 22496.

sell was roughly 50 basis points (compared to 20 basis points in February 2021) with a market impact of 80 basis points (compared to 50 basis points in February 2021). BZX contends that as the liquidity in the bitcoin spot market increases, it follows that the impact of $5 million and $10 million orders will continue to decrease.[64]

However, the data furnished by BZX regarding the cost to move the price of bitcoin, and the market impact of such attempts, are incomplete. BZX does not provide meaningful analysis pertaining to how these figures compare to other markets or why one must conclude, based on the numbers provided, that the bitcoin market is costly to manipulate. Further, BZX's analysis of the market impact of a mere two sample transactions is not sufficient evidence to conclude that the bitcoin market is resistant to manipulation.[65] Even assuming that the Commission agreed with BZX's premise, that it is costly to manipulate the bitcoin market and it is becoming increasingly so, any such evidence speaks only to establish that there is some resistance to manipulation, not that it establishes unique resistance to manipulation to warrant dispensing with the standard surveillance-sharing agreement.[66] The Commission thus concludes that the record does not demonstrate that the nature of bitcoin trading renders the bitcoin market inherently and uniquely resistant to fraud and manipulation.

Moreover, BZX does not sufficiently contest the presence of possible sources of fraud and manipulation in the bitcoin spot market generally that the Commission has raised in previous orders, which have included (1) ''wash'' trading,[67] (2) persons with a dominant position in bitcoin manipulating bitcoin pricing, (3) hacking of the bitcoin network and trading platforms, (4) malicious control of the bitcoin network, (5) trading based on material, non-public information, including the dissemination of false and misleading information, (6) manipulative activity involving the purported ''stablecoin'' Tether (USDT), and (7) fraud and manipulation at bitcoin trading platforms.[68]

In addition, BZX does not address risk factors specific to the bitcoin blockchain and bitcoin platforms, described in the Trust's Registration Statement, that undermine the argument that the bitcoin market is inherently resistant to fraud and manipulation. For example, the Registration Statement acknowledges that the ''price of bitcoin as determined by the bitcoin market has experienced periods of extreme volatility and may be influenced by, among other things, trading activity and the closing of bitcoin trading platforms due to fraud, failure, security breaches or otherwise''; that the bitcoin blockchain could be vulnerable to a ''51% attack,'' in which a bad actor or actors that control a majority of the processing power dedicated to mining on the bitcoin network may be able to alter the bitcoin blockchain on which the bitcoin network and bitcoin transactions rely; that the nature of the assets held at bitcoin platforms makes them appealing targets for hackers, that some bitcoin platforms have been the victim of cybercrimes, subject to cybersecurity breaches, or ''hacked,'' resulting in losses, and that ''[n]o bitcoin [platform] is immune from these risks''; that bitcoin platforms on which bitcoin trade are relatively new and, in some cases, largely unregulated, and, therefore, may be more exposed to fraud and security breaches than established, regulated exchanges for other financial assets or instruments; and that ''[o]ver the past several years, a number of bitcoin [platforms] have been closed or faced issues due to fraud, failure, security breaches or governmental regulations.''[69]

BZX also asserts that other means to prevent fraud and manipulation are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Exchange mentions that the Reference Rate, which is used to value the Trust's bitcoin, is itself resistant to manipulation based on the Reference Rate's methodology.[70] The Exchange states that the Reference Rate is calculated based on the ''Relevant Transactions''[71] of all of its Constituent Bitcoin Platforms. All Relevant Transactions are added to a joint list, recording the time of execution, trade price, and size for each transaction, and the list is partitioned by timestamp into 12 equally-sized time intervals of five minute length.[72] For each partition separately, the volume-weighted median trade price is calculated from the trade prices and sizes of all Relevant Transactions.[73] The Reference Rate is then determined by the arithmetic mean of the volume-weighted medians of all partitions.[74] According to BZX, ''[b]y employing the foregoing steps, the Reference Rate thereby seeks to ensure that transactions in bitcoin conducted at outlying prices do not have an undue effect on the value of a specific partition, large trades or clusters of trades transacted over a short period of time will not have an undue influence on the index level, and the effect of large trades at prices that deviate from the prevailing price are mitigated from having an undue influence on the benchmark level.''[75] BZX concludes its analysis of the Reference Rate by noting that ''an oversight function is implemented by the Benchmark Administrator in seeking to ensure that the Reference Rate is administered through codified policies for Reference Rate integrity.''[76]

The Custodian, in a comment letter, agrees that BZX's choice of the Reference Rate, which includes a composite of bitcoin prices from underlying spot bitcoin platforms, including the Custodian's platform, is a further factor in support of the proposed ETP.[77] The Custodian asserts that it and other ''regulated digital asset exchanges'' and custodians have a history of operations in compliance with a regulatory framework developed specifically to address activities in digital assets, including guidance by the New York State Department of Financial Services (''NYSDFS'') regarding the implementation of anti-fraud measures. The Custodian states that it meets this obligation through automated systems and robust internal controls and surveillance, and that the growing sophistication of market surveillance tools and strategies in the bitcoin market

[64] *See id.*

[65] Aside from stating that the ''statistics are based on samples of bitcoin liquidity in USD (excluding stablecoins or Euro liquidity) based on executable quotes on Coinbase Pro, Gemini, Bitstamp, Kraken, LMAX Exchange, BinanceUS, and OKCoin during February 2021,'' the Exchange provides no other information pertaining to the methodology used to enable the Commission to evaluate these findings or their significance. *See id.* at 22492 n.61.

[66] *See* USBT Order, 85 FR at 12601.

[67] *See supra* notes 59–60 and accompanying text.

[68] *See* USBT Order, 85 FR at 12600–01 & nn.66–67 (discussing J. Griffin & A. Shams, *Is Bitcoin Really Untethered?* (October 28, 2019), *available at https://ssrn.com/abstract=3195066* and published in 75 J. Finance 1913 (2020)); Winklevoss Order, 83 FR at 37585–86.

[69] *See* Registration Statement at 1, 11, 13. *See also* Winklevoss Order, 83 FR at 37585.

[70] *See* Notice, 86 FR at 22492, 22497.

[71] According to the Exchange, a ''Relevant Transaction'' is any cryptocurrency versus U.S. dollar spot trade that occurs during the observation window between 3:00 p.m. and 4:00 p.m. E.T. on a Constituent Bitcoin Platform in the BTC/USD pair that is reported and disseminated by a Constituent Bitcoin Platform and observed by the Benchmark Administrator. *See id.* at 22493 n.66.

[72] *See id.* at 22493.

[73] *See id.* According to the Exchange, a volume-weighted median differs from a standard median in that a weighting factor, in this case trade size, is factored into the calculation. *See id.*

[74] *See id.*

[75] *See id.*

[76] *See id.*

[77] *See* Gemini Letter at 2.

as well as the growing proportion of bitcoin activity occurring on ''regulated exchanges'' is a key development to mollify concerns about price manipulation or other manipulative practices in the bitcoin market.[78] The Sponsor, in a comment letter, states that global bitcoin and cryptocurrency markets are subject to increasing levels of regulation, oversight, and enforcement actions by global governments and regulatory bodies.[79]

Simultaneously with these assertions regarding the Reference Rate, the Exchange also states that, because the Trust will engage in in-kind creations and redemptions only, the ''manipulability of the Reference Rate [is] significantly less important.'' [80] The Exchange elaborates further that, ''because the Trust will not accept cash to buy bitcoin in order to create new shares or . . . be forced to sell bitcoin to pay cash for redeemed shares, the price that the Sponsor uses to value the Trust's bitcoin is not particularly important.'' [81] According to BZX, when authorized participants create Shares with the Trust, they would need to deliver a certain number of bitcoin per share (regardless of the valuation used), and when they redeem with the Trust, they would similarly expect to receive a certain number of bitcoin per share.[82] As such, BZX argues that even if the price used to value the Trust's bitcoin is manipulated, the ratio of bitcoin per Share does not change, and the Trust will either accept (for creations) or distribute (for redemptions) the same number of bitcoin regardless of the value.[83] This, according to BZX, not only mitigates the risk associated with potential manipulation, but also discourages and disincentivizes manipulation of the Reference Rate because there is little financial incentive to do so.[84]

The Sponsor, in a comment letter, agrees that the in-kind process by which the Shares will be created and redeemed makes the Shares inherently resistant to manipulation. The Sponsor states that the ''creation and redemption of Trust Shares through the in-kind exchange mechanism is solely dependent on the *amount* of bitcoin to be received or delivered by the Trust and is completely independent of the *value* of bitcoin at that point in time.'' [85] The Sponsor also states that, in contrast to other OTC bitcoin funds that receive cash from investors and then purchase bitcoin in the spot market, the size and timing of which can contribute to the value of these funds' quoted prices deviating from NAV, the Trust and its Shares will not be subjected to this potential source of NAV deviation.[86] The Sponsor further states that the fact that the Trust's expenses are paid in bitcoin, not cash, makes these expense payments ''completely independent of the value of bitcoin or the Reference Rate,'' which mitigates the risk associated with potential manipulation and discourages manipulation of the Reference Rate because there is little financial incentive to do so.[87]

Based on assertions made and the information provided, the Commission can find no basis to conclude that BZX has articulated other means to prevent fraud and manipulation that are sufficient to justify dispensing with the requisite surveillance-sharing agreement.

First, the record does not demonstrate that the proposed methodology for calculating the Reference Rate would make the proposed ETP resistant to fraud or manipulation such that a surveillance-sharing agreement with a regulated market of significant size is unnecessary.[88] Specifically, the Exchange has not assessed the possible influence that spot platforms not included among the Constituent Bitcoin Platforms would have on bitcoin prices used to calculate the Reference Rate.[89] And as discussed above, the record does not establish that the broader bitcoin market is inherently and uniquely resistant to fraud and manipulation. Accordingly, to the extent that trading on platforms not directly used to calculate the Reference Rate affects prices on the Constituent Bitcoin Platforms, the characteristics of those other platforms—where various kinds of fraud and manipulation from a variety of sources may be present and persist—affect whether the Reference Rate is resistant to manipulation.

Moreover, the Exchange's assertions that the Reference Rate's methodology helps make the Reference Rate resistant to manipulation are contradicted by the Registration Statement's own statements. Specifically, the Registration Statement states that ''[b]itcoin [platforms] on which bitcoin trades . . . may be more exposed to fraud and security breaches than established, regulated exchanges for other financial assets or instruments, which could have a negative impact on the performance of the Trust.'' [90] Constituent Bitcoin Platforms are a subset of the bitcoin platforms currently in existence. Although the Sponsor raises concerns regarding fraud and security of bitcoin platforms in the Registration Statement, the Exchange does not explain how or why such concerns are consistent with its assertion that the Reference Rate is resistant to fraud and manipulation.

BZX also has not shown that its proposed use of 12 equally-sized time intervals of five minute length over the observation window between 3:00 p.m. and 4:00 p.m. E.T. to calculate the Reference Rate would effectively be able to eliminate fraudulent or manipulative activity that is not transient. Fraud and manipulation in the bitcoin spot market could persist for a ''significant duration.'' [91] The Exchange does not connect the use of such partitions to the duration of the effects of the wash and fictitious trading that may exist in the bitcoin spot market.[92]

The Commission thus concludes that the Exchange has not demonstrated that its Reference Rate methodology makes the proposed ETP resistant to manipulation. While the proposed procedures for calculating the Reference Rate using only prices from the Constituent Bitcoin Platforms are intended to provide some degree of protection against attempts to

[78] *See id.* The Custodian also states that it is registered with the Financial Crimes Enforcement Network (''FinCEN'') as a money service business and maintains money transmitter licenses (or the statutory equivalent) in all states where this is required. *See* Gemini Letter at 3 and *infra* note 98.

[79] *See* Kryptoin Letter at 7. The Sponsor states that in January 2019, the Singapore Government enacted the Payment Services Act, bringing cryptocurrency dealing or exchange services under the supervision of the Monetary Authority of Singapore, Singapore's central bank and financial regulator. *See id.* The Sponsor, however, provides no data, information, or analysis as to how such ''global governments and regulatory bodies'' oversee bitcoin markets in general, or the Constituent Bitcoin Platforms in particular; or how any such regulation makes the listing and trading of the Shares inherently resistant to fraud and manipulation.

[80] *See* Notice, 86 FR at 22492.

[81] *See id.*

[82] *See id.*

[83] *See id.*

[84] *See id.*

[85] *See* Kryptoin Letter at 1–2.

[86] *See id.* at 2.

[87] *See id.* at 14.

[88] The Commission has previously considered and rejected similar arguments about the valuation of bitcoin according to a benchmark or reference price. *See, e.g.,* SolidX Order, 82 FR at 16258; Winklevoss Order, 83 FR at 37587–90; USBT Order, 85 FR at 12599–601.

[89] As discussed above, while the Exchange asserts that bitcoin prices on platforms with wash trades or other activity intended to manipulate the price of bitcoin do not influence the ''real'' price of bitcoin or Reference Rate, the Commission has no basis on which to conclude that bitcoin platforms are insulated from prices of others that engage in or permit fraud or manipulation. *See supra* notes 59–60 and accompanying text.

[90] *See* Registration Statement at 11.

[91] *See* USBT Order, 85 FR at 12601 n.66; *see also id.* at 12607.

[92] *See* WisdomTree Order, 86 FR at 69327.

manipulate the Reference Rate, these procedures are not sufficient for the Commission to dispense with the requisite surveillance-sharing agreement with a regulated market of significant size.

Second, the Custodian asserts that the growing sophistication of market surveillance tools and strategies used by the Constituent Bitcoin Platforms, as well as the growing proportion of bitcoin activity occurring on ''regulated exchanges,'' ''mollify concerns about price manipulation or other manipulative practices.'' [93] However, the level of regulation on the Constituent Bitcoin Platforms is not equivalent to the obligations, authority, and oversight of national securities exchanges or futures exchanges and therefore is not an appropriate substitute.[94] National securities exchanges are required to have rules that are ''designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.'' [95] Moreover, national securities exchanges must file proposed rules with the Commission regarding certain material aspects of their operations,[96] and the Commission has the authority to disapprove any such rule that is not consistent with the requirements of the Exchange Act.[97] Thus, national securities exchanges are subject to Commission oversight of, among other things, their governance, membership qualifications, trading rules, disciplinary procedures, recordkeeping, and fees.[98]

The Constituent Bitcoin Platforms, on the other hand, have none of these requirements (none are registered as a national securities exchange).[99] Further, although the Custodian claims that the Constituent Bitcoin Platforms have market surveillance tools and strategies that are growing in sophistication, the Custodian provides no supporting evidence to substantiate its claims. Moreover, even assuming that the Constituent Bitcoin Platforms are as vigilant towards fraud and manipulation as the Custodian describes, neither the Exchange nor the Custodian attempts to establish that only the Constituent Bitcoin Platforms'' ability to detect and deter fraud and manipulation would matter, exclusive of other bitcoin spot markets. In other words, neither addresses how fraud and manipulation on other bitcoin spot markets may influence the price of bitcoin.

Third, the Exchange does not explain the significance of the Reference Rate's purported resistance to manipulation to the overall analysis of whether the proposal to list and trade the Shares is designed to prevent fraud and manipulation. Even assuming that the Exchange's argument is that, if the Reference Rate is resistant to manipulation, the Trust's NAV, and thereby the Shares as well, would be resistant to manipulation, the Exchange has not established in the record a basis for such conclusion. That assumption aside, the Commission notes that the Shares would trade at market-based prices in the secondary market, not at NAV, which then raises the question of the significance of the NAV calculation to the manipulation of the Shares.

Fourth, the Exchange's arguments are contradictory. While arguing that the Reference Rate is resistant to manipulation, the Exchange simultaneously downplays the importance of the Reference Rate in light of the Trust's in-kind creation and redemption mechanism.[100] The Exchange points out that the Trust will create and redeem Shares in-kind, not in cash, which renders the NAV calculation, and thereby the ability to manipulate NAV, ''significantly less important.'' [101] In BZX's own words, the Trust will not accept cash to buy bitcoin in order to create shares or sell bitcoin to pay cash for redeemed shares, so the price that the Sponsor uses to value the Trust's bitcoin ''is not particularly important.'' [102] If the Reference Rate that the Trust uses to value the Trust's bitcoin ''is not particularly important,'' it follows that the Reference Rate's resistance to manipulation is not material to the Shares' susceptibility to fraud and manipulation.[103] As neither the Exchange nor the Sponsor addresses or provides any analysis with respect to these issues, the Commission cannot conclude that the Reference Rate aids in the determination that the proposal to list and trade the Shares is designed to prevent fraudulent and manipulative acts and practices.

[93] *See* Gemini Letter at 2.

[94] *See also* USBT Order, 85 FR at 12603–05.

[95] *See* 15 U.S.C. 78f(b)(5).

[96] 17 CFR 240.19b–4(a)(6)(i).

[97] Section 6 of the Exchange Act, 15 U.S.C. 78f, requires national securities exchanges to register with the Commission and requires an exchange's registration to be approved by the Commission, and Section 19(b) of the Exchange Act, 15 U.S.C. 78s(b), requires national securities exchanges to file proposed rules changes with the Commission and provides the Commission with the authority to disapprove proposed rule changes that are not consistent with the Exchange Act. Designated contract markets (''DCMs'') (commonly called ''futures markets'') registered with and regulated by the Commodity Futures Trading Commission (''CFTC'') must comply with, among other things, a similarly comprehensive range of regulatory principles and must file rule changes with the CFTC. See, *e.g.*, Designated Contract Markets (DCMs), CFTC, *available at https://www.cftc.gov/IndustryOversight/TradingOrganizations/DCMs/index.htm.*

[98] *See* Winklevoss Order, 83 FR at 37597. The Commission notes that the NYSDFS has issued ''guidance'' to supervised virtual currency business entities, stating that these entities must ''implement measures designed to effectively detect, prevent, and respond to fraud, attempted fraud, and similar wrongdoing.'' *See* Maria T. Vullo, Superintendent of Financial Services, NYSDFS, *Guidance on Prevention of Market Manipulation and Other Wrongful Activity* (Feb. 7, 2018), *available at https://www.dfs.ny.gov/docs/legal/industry/il180207.pdf.* The NYSDFS recognizes that its ''guidance is not intended to limit the scope or applicability of any law or regulation'' (*id.*), which would include the Exchange Act. Nothing in the record evidences whether the Reference Rate's Constituent Bitcoin Platforms have complied with this NYSDFS guidance. Further, as stated previously, there are substantial differences between the NYSDFS and FinCEN versus the Commission's regulation. Anti-Money Laundering (''AML'') and Know-Your-Customer (''KYC'') policies and procedures, for example, have been referenced in other bitcoin-based ETP proposals as a purportedly alternative means by which such ETPs would be uniquely resistant to manipulation. The Commission has previously concluded that such AML and KYC policies and procedures do not serve as a substitute for, and are not otherwise dispositive in the analysis regarding the importance of, having a surveillance-sharing agreement with a regulated market of significant size relating to bitcoin. For example, AML and KYC policies and procedures do not substitute for the sharing of information about market trading activity or clearing activity and do not substitute for regulation of a national securities exchange. *See* USBT Order, 85 FR at 12603 n.101.

[99] *See* 15 U.S.C. 78e, 78f.

[100] *See supra* notes 80–84 and accompanying text.

[101] *See* Notice, 86 FR at 22492 (''While the Sponsor believes that the Reference Rate which it uses to value the Trust's bitcoin is itself resistant to manipulation based on the methodology further described below, the fact that creations and redemptions are only available in-kind makes the manipulability of the Reference Rate significantly less important.'').

[102] *See id.* (concluding that ''because the Trust will not accept cash to buy bitcoin in order to create new shares or, barring a forced redemption of the Trust or under other extraordinary circumstances, be forced to sell bitcoin to pay cash for redeemed shares, the price that the Sponsor uses to value the Trust's bitcoin is not particularly important.'').

[103] Similarly, the Sponsor asserts that the Trust and the Shares are inherently resistant to manipulation due to the in-kind create/redeem process. *See* Kryptoin Letter at 1. Yet in the Sponsor's own words, the creation and redemption of Shares is ''completely independent'' of the *value* of bitcoin at that point in time, *i.e.*, completely independent of the Reference Rate and the Trust's NAV. *See id.* at 2. As such, going by the Sponsor's own assertion, it again follows that the Reference Rate's resistance to manipulation is not material to the Shares'' susceptibility to fraud and manipulation.

Fifth, the Commission finds that neither BZX nor the Sponsor has demonstrated that in-kind creations and redemptions provide the Shares with a unique resistance to manipulation.[104] The Commission has previously addressed similar assertions.[105] As the Commission stated before, in-kind creations and redemptions are a common feature of ETPs, and the Commission has not previously relied on the in-kind creation and redemption mechanism as a basis for excusing exchanges that list ETPs from entering into surveillance-sharing agreements with significant, regulated markets related to the portfolio's assets.[106] Accordingly, the Commission is not persuaded here that the Trust's in-kind creations and redemptions afford it a unique resistance to manipulation.[107]

Finally, the Sponsor, in a comment letter, cites to the Commission's 2004 approval of the SPDR Gold Trust as evidence that a combination of (1) a deep and liquid spot market, (2) an information-sharing agreement with a commodity futures exchange, and (3) exchange trading rules to govern the trading of ETP shares by liquidity providers, justify dispensing with the requisite surveillance-sharing agreement.[108] The Sponsor states that the spot bitcoin market is deep and liquid;[109] that the Exchange is a member of ISG, as is the CME that lists bitcoin futures; and that the Exchange has rules in place to govern the trading of the Trust's Shares.[110] The Sponsor concludes that, therefore, there is a solid base of evidence to support the Commission's approval of the proposed ETP.[111]

The Commission disagrees. The Commission considered and discussed the Gold Order at length in the Winklevoss Order. While the Gold Order observes that it is ''not possible . . . to enter into an information sharing agreement with the OTC gold market,'' the order continues: ''Nevertheless, the Commission believes that the unique liquidity and depth of the gold market, together with the MOU [Memorandum of Understanding] with NYMEX (of which COMEX is a Division) and NYSE Rules 1300(b) and 1301, create the basis for the [ETP listing exchange] to monitor for fraudulent and manipulative practices in the trading of the Shares.''[112] Thus, even though the Commission found that the OTC market for gold was ''extremely deep and liquid,''[113] the Commission's approval of the first precious metal ETP expressly relied on an agreement to share surveillance information between the ETP listing exchange and a significant, regulated market for gold futures.[114] The Commission continues to maintain that the Gold Order demonstrates the importance of establishing an agreement to share surveillance information between the ETP listing exchange and a significant, regulated market.[115] Accordingly, having a surveillance-sharing agreement with CME is not sufficient—the Exchange must demonstrate that CME is ''a *significant*, regulated market.''

(2) Assertions That BZX Has Entered Into a Comprehensive Surveillance-Sharing Agreement With a Regulated Market of Significant Size

As BZX has not demonstrated that other means besides surveillance-sharing agreements will be sufficient to prevent fraudulent and manipulative acts and practices, the Commission next examines whether the record supports the conclusion that BZX has entered into a comprehensive surveillance-sharing agreement with a regulated market of significant size relating to the underlying assets. In this context, the term ''market of significant size'' includes a market (or group of markets) as to which (i) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to successfully manipulate the ETP, so that a surveillance-sharing agreement would assist in detecting and deterring misconduct, and (ii) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.[116]

As the Commission has stated in the past, it considers two markets that are members of the ISG to have a comprehensive surveillance-sharing agreement with one another, even if they do not have a separate bilateral surveillance-sharing agreement.[117] Accordingly, based on the common membership of BZX and CME in the ISG,[118] BZX has the equivalent of a comprehensive surveillance-sharing agreement with CME. However, while the Commission recognizes that the CFTC regulates the CME futures market,[119] including the CME bitcoin futures market, and thus such market is ''regulated,'' in the context of the

[104] The Sponsor asserts that the in-kind create/redeem process provides for an arbitrage pricing mechanism whereby authorized participants trade the price deviations ''between the Trust's secondary market prices *and NAV*,'' keeping the Shares'' price ''*at or near NAV*'' (emphasis added). *See* Kryptoin Letter at 2. However, this assertion is also contradicted by the Sponsor's statement that the in-kind create/redeem process means that the amount of bitcoin that an authorized participant delivers to or receives from the Trust is ''completely independent'' of the *value* of bitcoin, *i.e.*, completely independent of NAV and the Reference Rate used to compute it. *See id.* Moreover, the prerequisite of an efficient arbitrage mechanism is not unique to the proposal here, as it is a fundamental premise of any ETP or exchange-traded fund, and the Commission has not previously dispensed with the requirement of a surveillance-sharing agreement based on an efficient arbitrage mechanism.

[105] *See* Winklevoss Order, 83 FR at 37589–90; USBT Order, 85 FR at 12607–08.

[106] *See, e.g.*, iShares COMEX Gold Trust, Securities Exchange Act Release No. 51058 (Jan. 19, 2005), 70 FR 3749, 3751–55 (Jan. 26, 2005) (SR–Amex–2004–38); iShares Silver Trust, Securities Exchange Act Release No. 53521 (Mar. 20, 2006), 71 FR 14969, 14974 (Mar. 24, 2006) (SR–Amex–2005–072).

[107] Putting aside the Exchange's various assertions about the nature of bitcoin and the bitcoin market, the Reference Rate, and the Shares, the Exchange also does not address concerns the Commission has previously identified, including the susceptibility of bitcoin markets to potential trading on material, non-public information (such as plans of market participants to significantly increase or decrease their holdings in bitcoin; new sources of demand for bitcoin; the decision of a bitcoin-based investment vehicle on how to respond to a ''fork'' in the bitcoin blockchain, which would create two different, non-interchangeable types of bitcoin), or to the dissemination of false or misleading information. *See* Winklevoss Order, 83 FR at 37585. *See also* USBT Order, 85 FR at 12600–01.

[108] *See* Kryptoin Letter at 13, citing Securities Exchange Act Release No. 50604 (Oct. 28, 2004), 69 FR 64614 (Nov. 5, 2004) (''Gold Order'').

[109] The Sponsor states that, for the six-month period ending August 13, 2021, average daily spot bitcoin trading volume across approximately 40 spot exchanges was $9.88 billion. The Sponsor compares this to estimates in the Gold Order of the 2003 high average daily gold trading volume of $7.9 billion (19 million troy ounces) and low average of $5.67 billion (13.6 million troy ounces). The Sponsor believes that the bitcoin spot market therefore meets, and exceeds, the Commission's ''definition'' of an extremely deep and liquid market. *See id.* at 4.

[110] The Sponsor cites BZX Rule 14.11(e)(4)(G) regarding the types of records and information that registered market makers in Commodity-Based Trust Shares must provide to the Exchange. *See id.* at 13–14.

[111] *See id.* at 13.

[112] *See* Gold Order, 69 FR at 64619.

[113] *See id.*

[114] *See* Winklevoss Order, 83 FR at 37592–94.

[115] *See id.* at 37594. The Commission further stated that ''[c]onsistent with the discussion of 'significant market' . . . , the Commission has not previously, and does not now, require that an ETP listing exchange be able to enter into a surveillance-sharing agreement with each regulated spot or derivatives market relating to an underlying asset, provided that the market or markets with which there is such an agreement constitute a 'significant market'.'' *See id.* at 37595.

[116] *See id.* at 37594. This definition is illustrative and not exclusive. There could be other types of ''significant markets'' and ''markets of significant size,'' but this definition is an example that provides guidance to market participants. *See id.*

[117] *See id.* at 37580 n.19.

[118] *See* Notice, 86 FR at 22491 nn.56–57 and accompanying text.

[119] While the Commission recognizes that the CFTC regulates the CME, the CFTC is not responsible for direct, comprehensive regulation of the underlying bitcoin spot market. *See* Winklevoss Order, 83 FR at 37587, 37599.

proposed ETP, the record does not, as explained further below, establish that the CME bitcoin futures market is a ''market of significant size'' as that term is used in the context of the applicable standard here.[120]

(i) Whether There is a Reasonable Likelihood That a Person Attempting To Manipulate the ETP Would Also Have To Trade on the CME Bitcoin Futures Market To Successfully Manipulate the ETP

The first prong in establishing whether the CME bitcoin futures market constitutes a ''market of significant size'' is the determination that there is a reasonable likelihood that a person attempting to manipulate the ETP would have to trade on the CME bitcoin futures market to successfully manipulate the ETP.

BZX notes that the CME began to offer trading in bitcoin futures in 2017.[121] According to BZX, nearly every measurable metric related to CME bitcoin futures contracts, which trade and settle like other cash-settled commodity futures contracts, has ''trended consistently up since launch and/or accelerated upward in the past year.'' [122] For example, according to BZX, there was approximately $28 billion in trading in CME bitcoin futures in December 2020 compared to $737 million, $1.4 billion, and $3.9 billion in total trading in December 2017, December 2018, and December 2019, respectively.[123] Additionally, CME bitcoin futures traded over $1.2 billion per day in December 2020 and represented $1.6 billion in open interest compared to $115 million in December 2019.[124] Similarly, BZX contends that the number of large open interest holders [125] has continued to increase, even as the price of bitcoin has risen, as have the number of unique accounts trading CME bitcoin futures.[126]

The Sponsor, in a comment letter, adds that CME trading volume has continued to increase substantially: Increasing by approximately 220 percent in July 2021 versus July 2020; increasing by approximately 156 percent year-to-date July 2021 versus year-to-date July 2020; reaching a record daily notional traded value of $7.33 billion on February 23, 2021, and a record open interest value of $3.17 billion on February 19, 2021; and in the six-month period ending August 13, 2021, reaching an average daily trading volume of $2.20 billion and average open interest of $1.98 billion.[127] The Sponsor states that this exceeds the 2003 average daily COMEX gold futures trading volume of approximately $2.04 billion.[128]

BZX argues that the significant growth in CME bitcoin futures across each of trading volumes, open interest, large open interest holders, and total market participants since the USBT Order was issued is reflective of that market's growing influence on the spot price. BZX asserts that where CME bitcoin futures lead the price in the spot market such that a potential manipulator of the bitcoin spot market (beyond just the Constituent Bitcoin Platforms) would have to participate in the CME bitcoin futures market, it follows that a potential manipulator of the Shares would similarly have to transact in the CME bitcoin futures market.[129]

BZX further states that academic research corroborates the overall trend outlined above and supports the thesis that CME bitcoin futures pricing leads the spot market. BZX asserts that academic research demonstrates that the CME bitcoin futures market was already leading the spot price in 2018 and 2019.[130] BZX concludes that a person attempting to manipulate the Shares would also have to trade on that market to manipulate the ETP.[131]

The Sponsor, in a comment letter, also argues that there is a reasonable likelihood that a person attempting to manipulate the Shares would also have to trade on the CME to manipulate the Shares.[132] Citing Hu, Hou & Oxley as evidence that CME bitcoin futures lead the price in the bitcoin spot markets,[133] the Sponsor states that an attempt to manipulate the spot market would require participation in the CME bitcoin futures market.[134] The Sponsor asserts that it follows, then, that an attempted manipulation of the Shares would similarly require participation in the CME bitcoin futures market, because both the CME CF Bitcoin Real-Time Index (''BRTI'') and the BRR, upon which CME bitcoin futures are settled, are calculated by observing prices in the underlying spot bitcoin markets.[135] The Sponsor asserts that an interrelationship between the CME bitcoin futures market and the Trust exists because the Trust's Reference Rate is based materially on the same methodology as the BRTI and BRR,[136] and therefore it is reasonable to assume that any effort to manipulate the Trust's NAV or Share price would also require an attempted manipulation of the CME bitcoin futures prices.[137] The Sponsor concludes that, because both the Exchange and the CME are members of the ISG, such attempted misconduct would be effectively detected and deterred.[138]

The Commission disagrees. The record does not demonstrate that there is a reasonable likelihood that a person attempting to manipulate the proposed ETP would have to trade on the CME bitcoin futures market to successfully manipulate it. Specifically, BZX's and the Sponsor's assertions about the general upward trends from 2018 to August 2021 in trading volume and open interest of, and in the number of large open interest holders and number of unique accounts trading in, CME bitcoin futures do not establish that the CME bitcoin futures market is of significant size. While BZX and the Sponsor provide data showing *absolute* growth in the size of the CME bitcoin futures market, they provide no data *relative* to the concomitant growth in either the bitcoin spot markets or other bitcoin futures markets (including unregulated futures markets). Moreover, even if the CME has grown in relative size, as the Commission has previously articulated, the interpretation of the term ''market of significant size'' or ''significant market'' depends on the interrelationship between the market with which the listing exchange has a surveillance-sharing agreement and the proposed ETP.[139] BZX's recitation of data reflecting the size of the CME bitcoin futures market, alone, either

[120] As described above (*see supra* notes 93–99 and accompanying text), in the context of the proposed ETP, the Reference Rate's Constituent Bitcoin Platforms are not ''regulated.'' They are not registered as ''exchanges'' and lack the obligations, authority, and oversight of national securities exchanges. Thus the Commission limits the scope of its analysis to the CME.

[121] According to BZX, each contract represents five bitcoin and is based on the CME CF Bitcoin Reference Rate. *See* Notice, 86 FR at 22489.

[122] *See id.*

[123] *See id.*

[124] *See id.*

[125] BZX represents that a large open interest holder in CME bitcoin futures is an entity that holds at least 25 contracts, which is the equivalent of 125 bitcoin. According to BZX, at a price of approximately $30,000 per bitcoin on December 31, 2020, more than 80 firms had outstanding positions of greater than $3.8 million in CME bitcoin futures. *See id.* at 22490 n.51.

[126] *See id.* at 22490.

[127] *See* Kryptoin Letter at 5.

[128] *See id.* at 4.

[129] *See* Notice, 86 FR at 22491.

[130] *See id.* at 22491, 22496 & n.52 (citing Y. Hu, Y. Hou & L. Oxley, *What role do futures markets play in Bitcoin pricing? Causality, cointegration and price discovery from a time-varying perspective,* 72 Int'l Rev. of Fin. Analysis 101569 (2020) (available at: *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7481826/*) (''Hu, Hou & Oxley'')).

[131] *See id.* at 22491–92, 22496.

[132] *See* Kryptoin Letter at 12.

[133] *See id.* at 11 n.22.

[134] *See id.* at 12.

[135] *See id.*

[136] *See id.* at 2.

[137] *See id.* at 2–3, 12.

[138] *See id.* at 3, 12.

[139] *See* USBT Order, 85 FR at 12611.

currently or in relation to previous years, is not sufficient to establish an interrelationship between the CME bitcoin futures market and the proposed ETP.[140]

Moreover, while the Sponsor asserts that an interrelationship exists between the CME bitcoin futures market and the Trust, on account of the Trust's Reference Rate being based materially on the same methodology as the BRTI and BRR,[141] and asserts that it is therefore reasonable to assume that any effort to manipulate the Trust's NAV or Share price would also require an attempted manipulation of the CME bitcoin futures prices,[142] the Sponsor provides no mechanism or example that would demonstrate the accuracy of the assumption. Moreover, as addressed above, the Sponsor itself undermines such an assumption by its own recognition that the Trust's in-kind create/redeem process is ''completely independent'' of the *value* of bitcoin,[143] and thereby completely independent of the Reference Rate used to compute such a value.

Further, the econometric evidence in the record for this proposal also does not support a conclusion that an interrelationship exists between the CME bitcoin futures market and the bitcoin spot market such that it is reasonably likely that a person attempting to manipulate the proposed ETP would also have to trade on the CME bitcoin futures market to successfully manipulate the proposed ETP.[144] While BZX and the Sponsor state that CME bitcoin futures pricing leads the spot market,[145] they rely on the findings of a price discovery analysis in one section of a single academic paper to support the overall thesis.[146] However, the findings of that paper's Granger causality analysis, which is widely used to formally test for lead-lag relationships, are concededly mixed.[147] In addition, the Commission considered an unpublished version of the paper in the USBT Order, as well as a comment letter submitted by the authors on that record.[148] In the USBT Order, as part of the Commission's conclusion that ''mixed results'' in academic studies failed to demonstrate that the CME bitcoin futures market constitutes a market of significant size, the Commission noted the paper's inconclusive evidence that CME bitcoin futures prices lead spot prices—in particular that the months at the end of the paper's sample period showed that the spot market was the leading market—and stated that the record did not include evidence to explain why this would not indicate a shift towards prices in the spot market leading the futures market that would be expected to persist into the future.[149] The Commission also stated that the paper's use of daily price data, as opposed to intraday prices, may not be able to distinguish which market incorporates new information faster.[150] BZX has not addressed either issue.

Moreover, BZX does not provide results of its own analysis and does not present any other data supporting its conclusion. BZX's unsupported representations constitute an insufficient basis for approving a proposed rule change in circumstances where, as here, the Exchange's assertion would form such an integral role in the Commission's analysis and the assertion is subject to several challenges.[151] In this context, BZX's reliance on a single paper, whose own lead-lag results are inconclusive, is especially lacking because the academic literature on the lead-lag relationship and price discovery between bitcoin spot and futures markets is unsettled.[152] In the USBT Order, the Commission responded to multiple academic papers that were cited and concluded that, in light of the mixed results found, the exchange there had not demonstrated that it is reasonably likely that a would-be manipulator of the proposed ETP would transact on the CME bitcoin futures market.[153] Likewise, here, given the body of academic literature to indicate to the contrary, the Commission concludes that the information that BZX provides is not a sufficient basis to support a determination that it is reasonably likely that a would-be manipulator of the proposed ETP would have to trade on the CME bitcoin futures market.[154]

The Commission accordingly concludes that the information provided in the record does not establish a reasonable likelihood that a would-be manipulator of the proposed ETP would have to trade on the CME bitcoin futures market to successfully manipulate the proposed ETP. Therefore, the

[140] *See id.* at 12612.

[141] *See* Kryptoin Letter at 2.

[142] *See id.* at 2–3, 12.

[143] *See id.* at 2 and *supra* notes 100–104 and accompanying text.

[144] *See* USBT Order, 85 FR at 12611. Listing exchanges have attempted to demonstrate such an ''interrelationship'' by presenting the results of various econometric ''lead-lag'' analyses. The Commission considers such analyses to be central to understanding whether it is reasonably likely that a would-be manipulator of the ETP would need to trade on the CME bitcoin futures market. *See id.* at 12612.

[145] *See* Notice, 86 FR at 22491; Kryptoin Letter at 12.

[146] *See supra* note 130 and accompanying text. BZX and the Sponsor reference the following conclusion from the ''time-varying price discovery'' section of Hu, Hou & Oxley: ''There exist no episodes where the Bitcoin spot markets dominates the price discovery processes with regard to Bitcoin futures. This points to a conclusion that the price formation originates solely in the Bitcoin futures market. We can, therefore, conclude that the Bitcoin futures markets dominate the dynamic price discovery process based upon time-varying information share measures. Overall, price discovery seems to occur in the Bitcoin futures markets rather than the underlying spot market based upon a time-varying perspective . . .'' *See* Notice, 86 FR at 22491 n.52; Kryptoin Letter at 11 n.22.

[147] The paper finds that the CME bitcoin futures market dominates the spot markets in terms of Granger causality, but that the causal relationship is bi-directional, and a Granger causality episode from March 2019 to June/July 2019 runs from bitcoin spot prices to CME bitcoin futures prices. The paper concludes: ''[T]he Granger causality episodes are not constant throughout the whole sample period. Via our causality detection methods, market participants can identify when markets are being led by futures prices and when they might not be.'' *See* Hu, Hou & Oxley, *supra* note 130.

[148] *See* USBT Order, 85 FR at 12609.

[149] *See id.* at 12613 n.244.

[150] *See id.*

[151] *See Susquehanna,* 866 F.3d at 447.

[152] *See, e.g.,* D. Baur & T. Dimpfl, *Price discovery in bitcoin spot or futures?,* 39 J. Futures Mkts. 803 (2019) (finding that the bitcoin spot market leads price discovery); O. Entrop, B. Frijns & M. Seruset, *The determinants of price discovery on bitcoin markets,* 40 J. Futures Mkts. 816 (2020) (finding that price discovery measures vary significantly over time without one market being clearly dominant over the other); J. Hung, H. Liu & J. Yang, *Trading activity and price discovery in Bitcoin futures markets,* 62 J. Empirical Finance 107 (2021) (finding that the bitcoin spot market dominates price discovery); B. Kapar & J. Olmo, *An analysis of price discovery between Bitcoin futures and spot markets,* 174 Econ. Letters 62 (2019) (finding that bitcoin futures dominate price discovery); E. Akyildirim, S. Corbet, P. Katsiampa, N. Kellard & A. Sensoy, *The development of Bitcoin futures: Exploring the interactions between cryptocurrency derivatives,* 34 Fin. Res. Letters 101234 (2020) (finding that bitcoin futures dominate price discovery); A. Fassas, S. Papadamou, & A. Koulis, *Price discovery in bitcoin futures,* 52 Res. Int'l Bus. Fin. 101116 (2020) (finding that bitcoin futures play a more important role in price discovery); S. Aleti & B. Mizrach, *Bitcoin spot and futures market microstructure,* 41 J. Futures Mkts. 194 (2021) (finding that relatively more price discovery occurs on CME as compared to four spot exchanges); J. Wu, K. Xu, X. Zheng & J. Chen, *Fractional cointegration in bitcoin spot and futures markets,* 41 J. Futures Mkts. 1478 (2021) (finding that CME bitcoin futures dominate price discovery). *See also* C. Alexander & D. Heck, *Price discovery in Bitcoin: The impact of unregulated markets,* 50 J. Financial Stability 100776 (2020) (finding that, in a multi-dimensional setting, including the main price leaders within futures, perpetuals, and spot markets, CME bitcoin futures have a very minor effect on price discovery; and that faster speed of adjustment and information absorption occurs on the unregulated spot and derivatives platforms than on CME bitcoin futures).

[153] *See* USBT Order, 85 FR at 12613 nn.239–244 and accompanying text.

[154] In addition, the Exchange fails to address the relationship (if any) between prices on other bitcoin futures markets and the CME bitcoin futures market, the bitcoin spot market, and/or the particular Constituent Bitcoin Platforms, or where price formation occurs when the entirety of bitcoin futures markets, not just CME, is considered.

information in the record also does not establish that the CME bitcoin futures market is a ''market of significant size'' with respect to the proposed ETP.

(ii) Whether It is Unlikely That Trading in the Proposed ETP Would Be the Predominant Influence on Prices in the CME Bitcoin Futures Market

The second prong in establishing whether the CME bitcoin futures market constitutes a ''market of significant size'' is the determination that it is unlikely that trading in the proposed ETP would be the predominant influence on prices in the CME bitcoin futures market.[155]

BZX asserts that trading in the Shares would not be the predominant force on prices in the CME bitcoin futures market (or spot market) because of the significant volume in the CME bitcoin futures market, the size of bitcoin's market capitalization, which is approximately $1 trillion, and the significant liquidity available in the spot market.[156] BZX provides that, according to February 2021 data, the cost to buy or sell $5 million worth of bitcoin averages roughly 10 basis points with a market impact of 30 basis points.[157] For a $10 million market order, the cost to buy or sell is roughly 20 basis points with a market impact of 50 basis points. Stated another way, BZX states that a market participant could enter a market buy or sell order for $10 million of bitcoin and only move the market 0.5 percent.[158] BZX further asserts that more strategic purchases or sales (such as using limit orders and executing through OTC bitcoin trade desks) would likely have less obvious impact on the market, which is consistent with MicroStrategy, Tesla, and Square being able to collectively purchase billions of dollars in bitcoin.[159] Thus, BZX concludes that the combination of CME bitcoin futures leading price discovery, the overall size of the bitcoin market, and the ability for market participants (including authorized participants creating and redeeming in-kind with the Trust) to buy or sell large amounts of bitcoin without significant market impact, will help prevent the Shares from becoming the predominant force on pricing in either the bitcoin spot or the CME bitcoin futures market.[160] The Sponsor agrees.[161]

The Commission does not agree. The record does not demonstrate that it is unlikely that trading in the proposed ETP would be the predominant influence on prices in the CME bitcoin futures market. As the Commission has already addressed and rejected one of the bases of BZX's assertion—that CME bitcoin futures leads price discovery[162]—it will only address below the other two bases—the overall size of, and the impact of buys and sells on, the bitcoin market.

BZX's assertions about the potential effect of trading in the Shares on the CME bitcoin futures market and bitcoin spot market are general and conclusory, repeating the aforementioned trade volume of the CME bitcoin futures market and the size and liquidity of the bitcoin spot market, as well as the market impact of a large transaction, without any analysis or evidence to support these assertions. For example, there is no limit on the amount of mined bitcoin that the Trust may hold. Yet BZX does not provide any information on the expected growth in the size of the Trust and the resultant increase in the amount of bitcoin held by the Trust over time, or on the overall expected number, size, and frequency of creations and redemptions—or how any of the foregoing could (if at all) influence prices in the CME bitcoin futures market. Moreover, in the Trust's Registration Statement, the Sponsor acknowledges that the Trust may acquire large size positions in bitcoin, which would increase the risk of illiquidity in the underlying bitcoin. Specifically, the Sponsor, in the Registration Statement, states that the Trust may acquire large size positions in bitcoin, which will increase the risk of illiquidity by both making the positions more difficult to liquidate and increasing the losses incurred while trying to do so, or by making it more difficult for authorized participants to acquire or liquidate bitcoin as part of the creation and/or redemption of Shares of the Trust.[163] Although the Trust's Registration Statement concedes that the Trust could negatively affect the liquidity of bitcoin, BZX does not address this in the proposal or discuss how impacting the liquidity of bitcoin can be consistent with the assertion that the Shares are unlikely to be the predominant influence on the prices of the CME bitcoin futures market. Thus, the Commission cannot conclude, based on BZX's statements alone and absent any evidence or analysis in support of BZX's assertions, that it is unlikely that trading in the ETP would be the predominant influence on prices in the CME bitcoin futures market.

The Commission also is not persuaded by BZX's assertions about the minimal effect a large market order to buy or sell bitcoin would have on the bitcoin market.[164] While BZX concludes by way of a $10 million market order example that buying or selling large amounts of bitcoin would have insignificant market impact, the conclusion does not analyze the extent of any impact on the CME bitcoin futures market. Even assuming that BZX is suggesting that a single $10 million order in bitcoin would have immaterial impact on the prices in the CME bitcoin futures market, this prong of the ''market of significant size'' determination concerns the influence on prices from trading *in* the proposed ETP, which is broader than just trading *by* the proposed ETP. While authorized participants of the Trust might only transact in the bitcoin spot market as part of their creation or redemption of Shares, the Shares themselves would be traded in the secondary market on BZX. The record does not discuss the expected number or trading volume of the Shares, or establish the potential effect of the Shares'' trade prices on CME bitcoin futures prices. For example, BZX does not provide any data or analysis about the potential effect the quotations or trade prices of the Shares might have on market-maker quotations in CME bitcoin futures contracts and whether those effects would constitute a predominant influence on the prices of those futures contracts.

Thus, because BZX has not provided sufficient information to establish both prongs of the ''market of significant size'' determination, the Commission cannot conclude that the CME bitcoin futures market is a ''market of significant size'' such that BZX would be able to rely on a surveillance-sharing agreement with the CME to provide sufficient protection against fraudulent and manipulative acts and practices.

The requirements of Section 6(b)(5) of the Exchange Act apply to the rules of national securities exchanges. Accordingly, the relevant obligation for

[155] *See* Winklevoss Order, 83 FR at 37594; USBT Order, 85 FR at 12596–97.

[156] *See* Notice, 86 FR at 22492, 22496.

[157] *See id.* According to BZX, these statistics are based on samples of bitcoin liquidity in U.S. dollars (excluding stablecoins or Euro liquidity) based on executable quotes on Coinbase Pro, Gemini, Bitstamp, Kraken, LMAX Exchange, BinanceUS, and OKCoin during February 2021. *See id.* at 22492 n.61.

[158] *See id.* at 22492, 22496.

[159] *See id.*

[160] *See id.*

[161] *See* Kryptoin Letter at 12.

[162] *See supra* notes 144–154 and accompanying text.

[163] See Registration Statement at 18.

[164] *See* Notice, 86 FR at 22492, 22496 (''For a $10 million market order, the cost to buy or sell is roughly 20 basis points with a market impact of 50 basis points. Stated another way, a market participant could enter a market buy or sell order for $10 million of bitcoin and only move the market 0.5%.'').

a comprehensive surveillance-sharing agreement with a regulated market of significant size, or other means to prevent fraudulent and manipulative acts and practices that are sufficient to justify dispensing with the requisite surveillance-sharing agreement, resides with the listing exchange. Because there is insufficient evidence in the record demonstrating that BZX has satisfied this obligation, the Commission cannot approve the proposed ETP for listing and trading on BZX.

C. Whether BZX Has Met Its Burden To Demonstrate That the Proposal Is Designed To Protect Investors and the Public Interest

BZX contends that, if approved, the proposed ETP would protect investors and the public interest. However, the Commission must consider these potential benefits in the broader context of whether the proposal meets each of the applicable requirements of the Exchange Act.[165] Because BZX has not demonstrated that its proposed rule change is designed to prevent fraudulent and manipulative acts and practices, the Commission must disapprove the proposal.

BZX asserts that, with the growth of U.S. investor exposure to bitcoin through OTC bitcoin funds, so too has grown the potential risk to U.S. investors.[166] Specifically, BZX argues that premium and discount volatility, high fees, insufficient disclosures, and technical hurdles are putting U.S. investor money at risk on a daily basis and that such risk could potentially be eliminated through access to a bitcoin ETP.[167] As such, the Exchange believes that approving this proposal (and comparable proposals submitted hereafter) would give U.S. investors access to bitcoin in a regulated and transparent exchange-traded vehicle that would act to limit risk to U.S. investors by: (i) Reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; (iii) providing an alternative to custodying spot bitcoin; and (iv) reducing risks associated with investing in operating companies that are imperfect proxies for bitcoin exposure.[168]

According to BZX, OTC bitcoin funds are generally designed to provide exposure to bitcoin in a manner similar to the Shares. However, unlike the Shares, BZX states that ''OTC bitcoin funds are unable to freely offer creation and redemption in a way that incentivizes market participants to keep their shares trading in line with their NAV and, as such, frequently trade at a price that is out-of-line with the value of their assets held.'' [169] BZX represents that, historically, OTC bitcoin funds have traded at a significant premium to NAV.[170] Although the Exchange concedes that trading at a premium or a discount is not unique to OTC bitcoin funds and not inherently problematic, BZX believes that it raises certain investor protections issues. First, according to BZX, investors are buying shares of a fund for a price that is not reflective of the per share value of the fund's underlying assets.[171] Second, according to BZX, because only accredited investors, generally, are able to create or redeem shares with the issuing trust and can buy or sell shares directly with the trust at NAV (in exchange for either cash or bitcoin) without having to pay the premium or sell into the discount, these investors that are allowed to interact directly with the trust are able to hedge their bitcoin exposure as needed to satisfy holding requirements and collect on the premium or discount opportunity. BZX argues, therefore, that the premium in OTC bitcoin funds essentially creates a direct payment from retail investors to more sophisticated investors.[172]

One commenter expresses support for the approval of bitcoin ETPs because they believe such ETPs would have lower premium/discount volatility and lower management fees than an OTC bitcoin fund.[173] The Sponsor, in a comment letter, states that on a year-to-date basis through August 13, 2021, the OTC bitcoin fund's total return was 19.91 percent versus its NAV of 56.56 percent; and on a one-year basis through August 13, 2021, the fund's total return was 192.7 percent versus its NAV return of 288.6 percent.[174] The Sponsor also states that, because OTC bitcoin funds are not listed on an exchange, they are therefore not subject to the same transparency and regulatory oversight by a listing exchange as the Trust's Shares would be.[175]

BZX also asserts that exposure to bitcoin through an ETP also presents advantages for retail investors compared to buying spot bitcoin directly.[176] BZX asserts that, without the advantages of an ETP, an individual retail investor holding bitcoin through a cryptocurrency trading platform lacks protections.[177] BZX explains that, typically, retail platforms hold most, if not all, retail investors'' bitcoin in ''hot'' (internet-connected) storage and do not make any commitments to indemnify retail investors or to observe any particular cybersecurity standard.[178] Meanwhile, a retail investor holding spot bitcoin directly in a self-hosted wallet may suffer from inexperience in private key management (*e.g.,* insufficient password protection, lost key, etc.), which could cause them to lose some or all of their bitcoin holdings.[179] BZX represents that the Custodian would, by contrast, use ''cold'' (offline) storage to hold private keys, employ a certain degree of cybersecurity measures and operational best practices, be highly experienced in bitcoin custody, and be accountable for failures.[180] Thus, with respect to custody of the Trust's bitcoin assets,

[165] *See* Winklevoss Order, 83 FR at 37602. *See also* GraniteShares Order, 83 FR at 43931; ProShares Order, 83 FR at 43941; USBT Order, 85 FR at 12615.

[166] *See* Notice, 86 FR at 22487.

[167] *See id.* BZX states that while it understands the Commission's previous focus on potential manipulation of a bitcoin ETP in prior disapproval orders, it now believes that ''such concerns have been sufficiently mitigated and that the growing and quantifiable investor protection concerns should be the central consideration as the Commission reviews this proposal.'' *See id.*

[168] *See id.*

[169] *See id.* BZX also states that, unlike the Shares, because OTC bitcoin funds are not listed on an exchange, they are not subject to the same transparency and regulatory oversight by a listing exchange. BZX further asserts that the existence of a surveillance-sharing agreement between BZX and the CME bitcoin futures market would result in increased investor protections for the Shares compared to OTC bitcoin funds. *See id.* at 22487 n.38.

[170] *See id.* at 22487. BZX further represents that the inability to trade in line with NAV may at some point result in OTC bitcoin funds trading at a discount to their NAV. According to BZX, while that has not historically been the case, trading at a discount would give rise to nearly identical potential issues related to trading at a premium. *See id.* at 22487 n.39.

[171] *See id.* at 22488.

[172] *See id.* The Sponsor, in a comment letter, states that sophisticated market participants have referred to this potential source of profit at the expense of retail investors as a ''free put option'' embedded in the OTC bitcoin funds. *See* Kryptoin Letter at 9.

[173] *See* letter from Anonymous, dated June 17, 2021.

[174] *See* Kryptoin Letter at 8. In addition to the premium/discount volatility's direct investment risk to retail investors, the Sponsor also points to two additional risks of the OTC bitcoin fund: (1) The inability to redeem or sell back shares to the fund in exchange for bitcoin or cash means that sophisticated investors who previously created shares directly with the fund at NAV before its shares began trading at a discount are now facing potentially substantial and widespread capital losses; and (2) because the fund periodically closes and does not accept any further investment through private placement, accredited and institutional investors could be unable to deploy capital in compliance with their investment mandates. *See id.* at 9.

[175] *See id.*

[176] *See* Notice, 86 FR at 22488.

[177] *See id.*

[178] *See id.*

[179] *See id.*

[180] *See id.*

BZX concludes that, compared to owning spot bitcoin directly, the Trust presents advantages from an investment protection standpoint for retail investors.[181]

The Custodian, in a comment letter, echoes some of the descriptions of the custodial arrangement.[182] The Custodian also specifies that its offline ''cold'' storage solution will hold the Trust's bitcoin in Hardware Security Modules that have achieved the highest security level of U.S. federal government standards and that are physically protected at the Custodian's network of secure facilities and that to carry out a transfer from the Trust's account, a quorum of these secure facilities must be involved to sign the transaction.[183] Also, according to the Custodian, it maintains digital asset insurance, is regularly audited by major financial and audit firms, and is subject to independent third-party verification that the Custodian's operations and security compliance structures meet the most robust of industry standards.[184] The Sponsor, in a comment letter, adds that the Custodian will perform its duties in a manner that meets the definition of a qualified custodian under the Investment Advisers Act of 1940, as amended.[185]

BZX further asserts that a number of operating companies engaged in unrelated businesses have announced investments as large as $1.5 billion in bitcoin.[186] Without access to bitcoin ETPs, BZX argues that retail investors seeking investment exposure to bitcoin may purchase shares in these companies in order to gain the exposure to bitcoin that they seek.[187] BZX contends that such operating companies, however, are imperfect bitcoin proxies and provide investors with partial bitcoin exposure paired with additional risks associated with whichever operating company they decide to purchase. BZX concludes that investors seeking bitcoin exposure through publicly traded companies are gaining only partial exposure to bitcoin and are not fully benefitting from the risk disclosures and associated investor protections that come from the securities registration process.[188]

BZX also states that investors in many other countries, including Canada, are able to use more traditional exchange-listed and traded products to gain exposure to bitcoin, disadvantaging U.S. investors and leaving them with more risky means of getting bitcoin exposure.[189] The Sponsor, in a comment letter, states that obtaining bitcoin exposure through CME bitcoin futures ''generally remain[s] beyond the scope of comfort level of retail investors'' because of, among other reasons, the risk of margin calls. The Sponsor states that this risk is eliminated entirely in the case of investors holding non-margin bitcoin investment alternatives, such as a bitcoin ETP.[190]

In essence, BZX asserts that the risky nature of direct investment in the underlying bitcoin and the unregulated markets on which bitcoin and OTC bitcoin funds trade compel approval of the proposed rule change. The Commission disagrees. Pursuant to Section 19(b)(2) of the Exchange Act, the Commission must approve a proposed rule change filed by a national securities exchange if it finds that the proposed rule change is consistent with the applicable requirements of the Exchange Act—including the requirement under Section 6(b)(5) that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices—and it must disapprove the filing if it does not make such a finding.[191] Thus, even if a proposed rule change purports to protect investors from a particular type of investment risk—such as the susceptibility of an asset to loss or theft—the proposed rule change may still fail to meet the requirements under the Exchange Act.[192]

Here, even if it were true that, compared to trading in unregulated bitcoin spot markets, trading a bitcoin-based ETP on a national securities exchange provides some additional protection to investors, the Commission must consider this potential benefit in the broader context of whether the proposal meets each of the applicable requirements of the Exchange Act.[193] As explained above, for bitcoin-based ETPs, the Commission has consistently required that the listing exchange have a comprehensive surveillance-sharing agreement with a regulated market of significant size related to bitcoin, or demonstrate that other means to prevent fraudulent and manipulative acts and practices are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The listing exchange has not met that requirement here. Therefore the Commission is unable to find that the proposed rule change is consistent with the statutory standard.

Pursuant to Section 19(b)(2) of the Exchange Act, the Commission must disapprove a proposed rule change filed by a national securities exchange if it does not find that the proposed rule change is consistent with the applicable requirements of the Exchange Act—including the requirement under Section 6(b)(5) that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices.[194]

For the reasons discussed above, BZX has not met its burden of demonstrating that the proposal is consistent with Exchange Act Section 6(b)(5),[195] and, accordingly, the Commission must disapprove the proposal.[196]

D. Other Comments

Comment letters also address the general nature and uses of bitcoin;[197] the state of development of bitcoin as a digital asset;[198] the inherent value of, and risks of investing in, bitcoin;[199] the desire of investors to gain access to bitcoin through an ETP;[200] the retirement investment benefits of a

[181] *See id.*

[182] *See* Gemini Letter at 2–3.

[183] *See id.*

[184] *See id.*

[185] *See* Kryptoin Letter at 10.

[186] *See* Notice, 86 FR at 22487.

[187] *See id.* at 22488–89. The Custodian, in its comment letter, agrees that the proposed ETP would offer greater investor protection and transparency than existing alternatives for retail customers to gain proxy exposure to bitcoin. *See* Gemini Letter at 2.

[188] *See* Notice, 86 FR at 22489.

[189] *See id.* at 22487. BZX represents that the Purpose Bitcoin ETF, a retail bitcoin-based ETP launched in Canada, reportedly reached $421.8 million in assets under management in two days, demonstrating the demand for a North American market listed bitcoin ETP. BZX contends that the Purpose Bitcoin ETF also offers a class of units that is U.S. dollar denominated, which could appeal to U.S. investors. BZX also argues that without an approved bitcoin ETP in the U.S. as a viable alternative, U.S. investors could seek to purchase these shares in order to get access to bitcoin exposure. BZX believes that, given the separate regulatory regime and the potential difficulties associated with any international litigation, such an arrangement would create more risk exposure for U.S. investors than they would otherwise have with a U.S. exchange-listed ETP. *See id.* at 22487 n.36. BZX also notes that regulators in other countries have either approved or otherwise allowed the listing and trading of bitcoin-based ETPs. *See id.* at 22487 n.37.

[190] *See* Kryptoin Letter at 10.

[191] *See* Exchange Act Section 19(b)(2)(C), 15 U.S.C. 78s(b)(2)(C).

[192] *See* SolidX Order, 82 FR at 16259; WisdomTree Order, 86 FR at 69334.

[193] *See supra* note 165.

[194] *See* 15 U.S.C. 78s(b)(2)(C).

[195] 15 U.S.C. 78f(b)(5).

[196] In disapproving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[197] *See, e.g.,* Patel Letter; letter from Sam Ahn, dated April 28, 2021 (''Ahn Letter'').

[198] *See, e.g.,* Ahn Letter; Gemini Letter at 2.

[199] *See, e.g.,* Ahn Letter; Patel Letter; letter from Bradley M. Kuhn, dated April 25, 2021 (''Kuhn Letter'').

[200] *See, e.g.,* Kuhn Letter; Gemini Letter at 2; Kryptoin Letter at 7.

bitcoin ETP;[201] and the bitcoin network's effect on the environment.[202] Ultimately, however, additional discussion of these topics is unnecessary, as they do not bear on the basis for the Commission's decision to disapprove the proposal.

IV. Conclusion

For the reasons set forth above, the Commission does not find, pursuant to Section 19(b)(2) of the Exchange Act, that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, with Section 6(b)(5) of the Exchange Act.

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act, that proposed rule change SR–CboeBZX–2021–029 be, and hereby is, disapproved.

By the Commission.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2021–28255 Filed 12–28–21; 8:45 am]

BILLING CODE 8011–01–P

[201] *See, e.g.,* Kuhn Letter.

[202] *See, e.g.,* Patel Letter.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93851; File No. SR–NYSE–2021–73]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change To Amend Rule 37 To Incorporate Standards of Conduct for the Exchange's Trading Floor

December 22, 2021.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b-4 thereunder,[3] notice is hereby given that, on December 13, 2021, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b-4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 37 to incorporate standards of conduct for the Exchange's Trading Floor modeled on rules of the Exchange's affiliates NYSE American LLC and NYSE Arca, Inc., and to add amended Rule 37 to the list of minor rule violations in Rule 9217. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 37 (Visitors) to incorporate standards of conduct for the Exchange's Trading Floor modeled on the rules of the Exchange's affiliates NYSE American LLC (''NYSE American'') and NYSE Arca, Inc. (''NYSE Arca''), and to add amended Rule 37 to the list of minor rule violations in Rule 9217.

Background

Rule 37 currently provides that visitors to the Floor shall not be admitted to the Floor of the Exchange except by permission of the Exchange. Historically, the behavior and conduct of members[4] on the trading Floor was regulated by Floor Conduct and Safety Guidelines administered by NYSE Floor Officials. The NYSE eliminated the role and function of NYSE Floor Officials earlier this year.[5]

NYSE American Rule 902NY (Admission and Conduct on the Options Trading Floor) and NYSE Arca Rule 6.2–O (Admission to and Conduct on the Options Trading Floor) specify standards of conduct and dress for persons to follow while on the NYSE American and NYSE Arca options trading floors as well requirements for trading floor badges. The rules are substantially similar.

NYSE American Rule 902NY(b) and NYSE Arca Rule 6.2–O(b) are titled ''Conduct on the Floor'' and provide that a permit holder may be fined upon the determination of a Trading Official that the permit holder's conduct on the options trading floor was such as to impair the maintenance of a fair and orderly market, or to impair public confidence in the operations of the exchange. The provisions of NYSE American Rule 902NY(b) and NYSE Arca Rule 6.2–O(b) also apply to a permit holder's failure to adequately supervise an employee to ensure his or her compliance with this rule. Permit holders adversely affected by a determination made under these rules may obtain review thereof consistent with other NYSE American and NYSE Arca rules, as applicable. However, fines imposed by a Trading Official under those rules do not preclude further disciplinary action by the respective exchanges.

Under NYSE American Rule 902NY(c) and NYSE Arca Rule 6.2–O(c) titled ''Standards of Dress and Conduct,'' all permit holders are required to act in a manner consistent with a fair and orderly market and with the maintenance of public confidence in the respective exchanges. Under the rules, all persons on the options trading floors must comply with certain standards of dress and conduct, as follows. NYSE American Rule 902NY(c)(1) and NYSE Arca Rule 6.2–O(c)(1) provide that all persons on the options trading floor, whether permit holders, employees of permit holders or visitors, shall at all times, whether prior to, during or after trading sessions, be dressed in a manner appropriate for business purposes and in accordance with good taste and professional standards. The rules provide that the term ''good taste'' shall be interpreted in a conservative manner. In addition, under the rules, the following requirements and prohibitions shall be observed:

[4] Rule 2(a) states that the term ''member,'' when referring to a natural person, means a natural person associated with a member organization who has been approved by the Exchange and designated by such member organization to effect transactions on the Floor or any facility thereof.

[5] *See* Securities Exchange Act Release No. 92193 (June 16, 2021), 82 FR 32024 (June 23, 2021) (SR–NYSE–2020–105) (Order).

• Personal attire must be neat, clean and presentable.

• All persons must wear trading jackets and/or suit or sport coats while present on the options trading floors.

• Each exchange may impose additional standards of dress or otherwise modify these standards of dress by means of a written policy that will be distributed to permit holders.

NYSE American Rule 902NY(c)(2)(A) and NYSE Arca Rule 6.2–O(c)(2)(A) specify that all persons on the trading floors are required to conduct themselves in accordance with a seemly and professional standard of behavior. No person while on the options trading floor shall:

• Engage in any act or practice that may be detrimental to the interest or welfare of the exchange (NYSE American Rule 902NY(c)(2)(A)(i) and NYSE Arca Rule 6.2–O(c)(2)(A)(i)); or

• engage in any act or practice that may serve to disrupt or hinder the ordinary and efficient conduct of business (NYSE American Rule 902NY(c)(2)(A)(ii) and NYSE Arca Rule 6.2–O(c)(2)(A)(ii)); or

• engage in any act or practice that may serve to jeopardize the safety or welfare of any other individual (NYSE American Rule 902NY(c)(2)(A)(iii) and NYSE Arca Rule 6.2–O(c)(2)(A)(iii)); or

• act in a disorderly manner, which includes, but is not limited to, the use of abusive or indecorous language (NYSE American Rule 902NY(c)(2)(A)(iv) and NYSE Arca Rule 6.2–O(c)(2)(A)(iv)).

NYSE American Rule 902NY(c)(2)(B) and NYSE Arca Rule 6.2–O(c)(2)(B) further provide that food or drink may be permitted at the discretion of the exchange and that alcoholic beverages may not be consumed on the trading floor at any time.

Under NYSE American Rule 902NY(c)(2)(C) and NYSE Arca Rule 6.2–O(c)(2)(C), smoking in any form, any kind of tobacco use, or any expectorating on the trading floor is prohibited. The prohibitions NYSE American Rule 902NY(c)(2)(C) and NYSE Arca Rule 6.2–O(c)(2)(C) apply at all times whether or not the floors are in session.

NYSE American Rule 902NY(c)(2)(D) and NYSE Arca Rule 6.2–O(c)(2)(D) prohibit running on the floor, which means any movement at a degree of speed which may disrupt other occupants of the trading floor.

NYSE American Rule 902NY(c)(2)(E) and NYSE Arca Rule 6.2–O(c)(2)(E) prohibit standing on chairs, furniture, booths, ladders, stools and similar items.

NYSE American Rule 902NY(c)(2)(F) and NYSE Arca Rule 6.2–O(c)(2)(F) provides that no object of any kind may be placed in the trading post areas if it could obstruct the flow of people in or out of the trading crowd.

Finally, NYSE American Rule 902NY(d)(1) and NYSE Arca Rule 6.2–O(d)(1) provide that admission to the trading floors is by exchange issued badge only and that, while on the trading floor, all persons must at all times display appropriate badges. The rules further provide that authorized persons seeking admission to the floor without a badge must show proper identification and obtain a temporary badge from the Security Office, and that permit holders may be subject to a processing fee related to the issuance of a temporary access badge. NYSE American Rule 902NY(d)(2) and NYSE Arca Rule 6.2–O(d)(2) govern withdrawal of trading floor badges.

Proposed Rule Change

Amended Rule 37

The Exchange proposes to revise Rule 37 to add to NYSE Rules the standards for conduct, dress and trading badges contained in NYSE American Rule 902NY and NYSE Arca Rule 6.2–O, with certain modifications as described below, and to amend Rule 9217 to provide for minor rule fines for violations of those standards. The proposed rule change would align the Exchange's rules with those of its affiliates as it relates to both the standards members accessing and working on the Floor must follow and the application of minor rule fines for violations of those standards.[6]

To effectuate this change, the Exchange proposes the following amendments to Rule 37.

First, Rule 37 would be renamed ''Admission and Conduct on the Trading Floor'' similar to the NYSE American and NYSE Arca options rules, with a difference to use the term ''Trading Floor.''

Second, the existing text of Rule 37 governing admissions would be relocated to a new subsection (a) titled ''Admission,'' once again along the lines of the NYSE American and NYSE Arca options rules.[7] The existing text would be unchanged.

Third, the Exchange would adopt a new subsection (b) titled ''Conduct on the Trading Floor'' that would be substantially similar to NYSE American Rule 902NY(b) and NYSE Arca Rule 6.2–O(b). The proposed rule would provide that while on the Trading Floor, all members are required to act in a manner consistent with a fair and orderly market and with the maintenance of public confidence in the Exchange.[8] The proposed rule would further provide that upon the determination that a member's conduct on the Floor is such as to impair the maintenance of a fair and orderly market, or to impair public confidence in the operations of the Exchange, or that a member has otherwise violated the proposed rule, a member may be disciplined in accordance with the Rule 9000 Series, the Exchange's disciplinary rules. Proposed Rule 37(b) would also apply to a member's failure to adequately supervise an employee or guest of the member to ensure compliance with the proposed rule. Unlike the NYSE American and NYSE Arca rules, the Exchange would explicitly refer to failure to adequately supervise a guest of the member in the proposed rule. Because violations of this Rule would be subject to discipline pursuant to the Rule 9000 Series, the Exchange proposes to include the phrase ''or that a member has otherwise violated this rule'' and exclude a statement that that fines imposed thereunder would not preclude further disciplinary action by the Exchange. Finally, unlike the NYSE American and NYSE Arca rules, the proposed rule would omit any reference to Exchange Trading Officials, who are not regulatory employees, unlike their options market counterparts. As proposed, Rule 37 would be administered by the Exchange's regulatory staff.

Fourth, the Exchange proposes a new subsection (c) titled ''Standards of Dress and Conduct'' that is also substantially similar to NYSE American Rule 902NY(c) and NYSE Arca Rule 6.2–O(c).

[6] The term ''Floor'' is defined in NYSE Rule 6 to mean ''the trading Floor of the Exchange and the premises immediately adjacent thereto, such as the various entrances and lobbies of the 11 Wall Street, 18 New Street, 8 Broad Street, 12 Broad Street and 18 Broad Street Buildings, and also means the telephone facilities available in these locations.'' The term ''Trading Floor'' is defined in NYSE Rule 6A to mean ''the restricted-access physical areas designated by the Exchange for the trading of securities, commonly known as the 'Main Room' and the 'Buttonwood Room.'" The NYSE Trading Floor does not include: ''(i) the areas in the ''Buttonwood Room'' designated by the Exchange where NYSE American-listed options are traded, which, for the purposes of the Exchange's Rules, shall be referred to as the ''NYSE American Options Trading Floor'' or (ii) the physical area within fully enclosed telephone booths located in 18 Broad Street at the Southeast wall of the Trading Floor.'' The areas designated by the Exchange where NYSE American-listed options are traded are subject to NYSE American Rule 902NY, described above.

[7] *See, e.g.,* NYSE American Rule 902NY(e).

[8] The first sentence of proposed Rule 37(b) would be based on NYSE American Rule 902NY(c) and NYSE Arca Rule 6.2–O(c).

Proposed Rule 37(c) would provide that all persons on the Floor must comply with the standards of dress and conduct set forth in proposed Rule 37(c)(1)(A)-(C), as follows.

Proposed Rule 37(c)(1) would be titled ''Standards of Dress'' and would provide that all persons on the Floor, whether members, employees of member organizations or visitors, must at all times, whether prior to, during or after trading sessions, be dressed in a manner appropriate for business purposes and in accordance with good taste and professional standards. Like the NYSE American and NYSE Arca rules, proposed Rule 37(c)(1) would provide that the term ''good taste'' will be interpreted in a conservative manner. In addition, proposed Rule 37(c)(1) would set forth the following requirements and prohibitions:

- Proposed Rule 37(c)(1)(A) would provide that personal attire must be neat, clean and presentable.
- Proposed Rule 37(c)(1)(B) would provide that all members and employees of member organizations must wear trading jackets and/or suit or sport coats while present on the Floor.
- Proposed Rule 37(c)(1)(C) would provide that the Exchange may impose additional standards of dress or otherwise modify these standards of dress by means of a written policy that will be distributed to all members and member organizations.

Proposed Rule 37(c)(2) would be titled ''Standards of Conduct.'' Proposed subsection (A) of Rule 37(c)(2) would provide that all persons on the Floor are required to conduct themselves in accordance with a seemly and professional standard of behavior. Specifically, the proposed Rule would specify that no person while on the Floor shall:

- Engage in any act or practice that may be detrimental to the interest or welfare of the Exchange (proposed Rule 37(c)(2)(A)(i)); or
- engage in any act or practice that may serve to disrupt or hinder the ordinary and efficient conduct of business (proposed Rule 37(c)(2)(A)(ii)); or
- engage in any act or practice that may serve to jeopardize the safety or welfare of any other individual (proposed Rule 37(c)(2)(A)(iii)); or
- act in a disorderly manner, which includes, but is not limited to, use of abusive or indecorous language and the display or circulation of written material or graphic images that are harassing, inappropriate, offensive, and/or lewd (proposed Rule 37(c)(2)(A)(iv)).

Proposed subsection (B) of Rule 37(c)(2) would provide that entry and consumption of food or drink on the Trading Floor may be permitted at the discretion of the Exchange and that food or drink should only be consumed at the booth or post. Finally, proposed Rule 37(c)(2)(B) would provide that alcoholic beverages may not be consumed on the Trading Floor during business hours as defined in Rule 7.1 (Hours of Business). The proposed Rule differs slightly from the NYSE American and NYSE Arca rules, which prohibit consumption of alcoholic beverages at any time.

Proposed subsection (C) of Rule 37(c)(2) would prohibit smoking in any form, any kind of tobacco use, or any expectorating on the Floor and clarify that this prohibition would apply at all times. The proposed Rule is identical to the NYSE American and NYSE Arca versions.

Proposed subsection (D) of Rule 37(c)(2) would prohibit running on the Trading Floor, which the proposed Rule would define as any movement at a degree of speed which may disrupt other occupants of the Floor. Once again, the proposed Rule is identical to the NYSE American and NYSE Arca versions.

Proposed subsection (E) of Rule 37(c)(2) would prohibit standing on chairs, furniture, booths, ladders, stools and similar items. The proposed Rule is the same as NYSE American Rule 902NY(c)(2)(E) and NYSE Arca Rule 6.2–O(c)(2)(E).

Proposed subsection (F) of Rule 37(c)(2) would provide that no object of any kind may be placed in the trading post areas, including all chairs, stools or other furniture, if it could obstruct the flow of people in or out of the Trading Floor. The Exchange determined to exclude the reference to the trading crowd that appears in the NYSE American and NYSE Arca rules.

Fifth and finally, the Exchange proposes a new subsection (d) to Rule 37 titled ''Trading Floor Badges.'' Rule 303 (Limitation on Access to Floor) currently requires members on the Floor to be provided with a badge that must be worn while on the Floor.[9] Proposed Rule 37(d) would supplement Rule 303 by specifying, similar to NYSE American Rule 902NY(d) and NYSE Arca Rule 6.2–O(d), that admission to the Floor will be by Exchange-issued badge only and that Exchange-issued badges must be appropriately displayed, with the photo visible, at all times while on the Floor. The proposed Rule would also specify that use of an Exchange-issued badge belonging to another member or Floor employee to enter or exit the Floor is prohibited. In addition, the proposed Rule would provide that authorized persons seeking admission to the Floor without a badge must show proper identification and obtain a temporary badge from the Security Office. Finally, proposed Rule 37(d) would provide that visitor's badges are not acceptable identification cards for Floor employees.

Minor Rule Fines

Rule 9217 sets forth the list of rules under which a member organization or covered person may be subject to a fine under Rule 9216(b). Rule 9217 permits the Exchange to impose a fine of up to $5,000 on any member or covered person for a minor violation of an eligible rule.

The Exchange proposes to amend Rule 9217 to add the proposed Rule 37 provisions governing floor decorum, disruptive actions involving physical contact while on the Floor, use of abusive language, rules on visitors, abuse of Exchange property, and misuse of Exchange-issued badge or identification to the list of rules in Rule 9217 eligible for disposition pursuant to a minor fine under Rule 9216(b). Each of these violations of NYSE American Rule 902NY and NYSE Arca Rule 6.2–O are eligible for minor rule fines under those markets' respective versions of Rule 9217.[10]

The Exchange believes that the proposed changes would have the immediate effect of aligning the Exchange's rules regarding Floor conduct and decorum with the rules of its affiliates that also have trading floors. Moreover, the Exchange believes that the proposed rule change will strengthen the Exchange's ability to carry out its oversight and enforcement responsibilities in cases where full disciplinary proceedings are unwarranted in view of the minor nature of the particular violation.

[9] Rule 303(a) provides that members who execute orders on the Floor must be provided with an identification badge and must wear the same while on the Floor, and that every member's badge must contain his or her name and a number and the name of his or her member organization.

[10] *See* NYSE American Rule 9217(i)(14) (violation of rules related to floor decorum); (i)(15) (disruptive action involving physical contact while on the Trading Floor); (i)(16) (ATP Holder used abusive language on the trading floor); (i)(20) (violation of rules on visitors to the options floor); (i)(21) (misuse of ATP Holder badge or identification); and (i)(25) (abusing exchange property); NYSE Arca Rule 10.9217(e)(16) (violation of rules related to floor decorum); (e)(17) (disruptive action involving physical contact while on the trading floor); (e)(19) (OTP Holder used abusive language on the trading floor); (e)(31) (violation of rules on visitors to the options floor); (e)(32) (misuse of OTP Holder badge or OTP Firm identification); and (e)(36) (abusing exchange property).

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[11] in general, and furthers the objectives of Section 6(b)(5) of the Act,[12] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

The Exchange believes that the proposed rule change would remove impediments to and perfect the mechanism of a free and open market and a national market system by adopting the same standards as its affiliates that members accessing and working on a trading floor must follow. By providing greater harmonization between Exchange rules and those of its affiliates that also have trading floors regarding access, conduct and decorum, the proposed rule change will foster cooperation and coordination with persons engaged in facilitating transactions in securities and will remove impediments to and perfect the mechanism of a free and open market and a national market system.

Moreover, by adopting the same applicable minor rule fines for violations of those standards as its affiliates, the Exchange would promote regulatory consistency. Minor rule fines provide a meaningful sanction for minor or technical violations of rules when the conduct at issue does not warrant stronger, immediately reportable disciplinary sanctions. The inclusion of a rule in the Rule 9217 does not minimize the importance of compliance with the rule, nor does it preclude the Exchange from choosing to pursue violations of eligible rules through formal disciplinary action if the nature of the violations or prior disciplinary history warrants more significant sanctions. Rather, the Exchange believes that the proposed rule change will strengthen the Exchange's ability to carry out its oversight and enforcement responsibilities in cases where full disciplinary proceedings are unwarranted in view of the minor nature of the particular violation. The option to impose a minor rule sanction gives the Exchange additional flexibility to administer its enforcement program in the most effective and efficient manner while still fully meeting the Exchange's remedial objectives in addressing violative conduct. The proposed rule change is thus designed to prevent fraudulent and manipulative acts and practices because it will provide the Exchange the ability to issue a minor rule fine for violations of the dress, conduct and decorum requirements set forth in proposed Rule 37 where a more formal disciplinary action may not be warranted or appropriate.

The Exchange further believes that the proposed amendments to Rule 9217 are consistent with Section 6(b)(6) of the Act,[13] which provides that members and persons associated with members shall be appropriately disciplined for violation of the provisions of the rules of the exchange, by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction. As noted, the proposed rule change would provide the Exchange ability to sanction minor or technical violations of proposed Rule 37 pursuant to the Exchange's rules.

Finally, the Exchange also believes that the proposed changes are designed to provide a fair procedure for the disciplining of members and persons associated with members, consistent with Sections 6(b)(7) and 6(d) of the Act.[14] Rule 9217 does not preclude a member organization or covered person from contesting an alleged violation and receiving a hearing on the matter with the same procedural rights through a litigated disciplinary proceeding.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[15] the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not designed to address any competitive issues but rather relates to the adoption of rules regarding access, conduct and decorum on the Exchange's trading floor that are consistent with those of the Exchange's affiliates that also have trading floors, and providing applicable minor rule fines for violations of those standards, thereby strengthening the Exchange's ability to carry out its oversight and enforcement functions and deter potential violative conduct.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR-NYSE–2021–73 on the subject line.

Paper Comments

- Send paper comments in triplicate to: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2021–73. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

[13] 15 U.S.C. 78f(b)(6).

[14] 15 U.S.C. 78f(b)(7) and 78f(d).

[15] 15 U.S.C. 78f(b)(8).

provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2021–73 and should be submitted on or before January 19, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–28246 Filed 12–28–21; 8:45 am]

BILLING CODE 8011–01–P

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 34451; File No. 812–15228]

FMI Funds, Inc., et al.

December 22, 2021.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice.

Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from sections 2(a)(32), 5(a)(1), 22(d) and 22(e) of the Act and rule 22c–1 under the Act, and under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act.

Applicants: FMI Funds, Inc. (''Company''), Fiduciary Management, Inc. (the ''Initial Adviser'') and Foreside Financial Services, LLC (the ''Distributor'', and, together with the Company, and the Adviser, the ''Applicants'').

Summary of Application: Applicants request an order (''Order'') that permits: (a) The Funds (defined below) to issue shares (''Shares'') redeemable in large aggregations only (''creation units''); (b) secondary market transactions in Shares to occur at negotiated market prices rather than at net asset value; (c) certain Funds to pay redemption proceeds, under certain circumstances, more than seven days after the tender of Shares for redemption; and (d) certain affiliated persons of a Fund to deposit securities into, and receive securities from, the Fund in connection with the purchase and redemption of creation units. The relief in the Order would incorporate by reference terms and conditions of the same relief of a previous order granting the same relief sought by applicants, as that order may be amended from time to time (''Reference Order'').[1]

Filing Date: The application was filed on May 5, 2021, and amended on July 30, 2021.

Hearing or Notification of Hearing: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by emailing the Commission's Secretary at *Secretarys-Office@sec.gov* and serving Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on January 17, 2022, 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 emailing the Commission's Secretary at *Secretarys-Office@sec.gov.*

ADDRESSES: The Commission: *Secretarys-Office@sec.gov.* Applicants: John S. Brandser, Fiduciary Management, Inc., 100 East Wisconsin, Suite 2200, Milwaukee, WI 53202, *rladwig@fmimgt.com*; Peter D. Fetzer, Foley & Lardner LLP, 777 East Wisconsin Avenue, Milwaukee, WI 53202, *pfetzer@foley.com.*

FOR FURTHER INFORMATION CONTACT: Jessica Shin, Attorney-Adviser, at (202) 551–3685 or Lisa Reid Ragen, Branch Chief, at (202) 551–6825 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or for an applicant using the Company name box, at *https://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicants

1. The Company is a corporation organized under the laws of the State of Maryland. The Company currently consists of four series, and will consist of one or more series operating as a Fund. The Company is registered as an open-end management investment company under the Act. Applicants seek relief with respect to Funds (as defined below), including an initial Fund (the ''Initial Fund''). The Funds will offer exchange-traded shares utilizing active management investment strategies as contemplated by the Reference Order.[2]

2. The Initial Adviser, a Wisconsin corporation, will be the investment adviser to the Initial Fund. Subject to approval by the Funds' board of trustees, an Adviser (as defined below) will serve as investment adviser to each Fund. The Initial Adviser is, and any other Adviser will be, registered as an investment adviser under the Investment Advisers Act of 1940 (''Advisers Act''). The Adviser may enter into sub-advisory agreements with other investment advisers to act as sub-advisers with respect to the Funds (each a ''Sub-Adviser''). Any Sub-Adviser to a Fund will be registered under the Advisers Act.

3. The Distributor, a Delaware limited liability company, is a broker-dealer registered under the Securities Exchange Act of 1934, as amended, and will act as the distributor and principal underwriter of Shares of the Funds. Applicants request that the requested relief apply to any distributor of Shares, whether affiliated or unaffiliated with the Adviser and/or Sub-Adviser. Any Distributor will comply with the terms and conditions of the Order.

Applicants' Requested Exemptive Relief

4. Applicants seek the requested Order under section 6(c) of the Act for an exemption from sections 2(a)(32), 5(a)(1), 22(d) and 22(e) of the Act and rule 22c–1 under the Act, and under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act. The requested Order would permit applicants to offer Funds that utilize the NYSE Proxy Portfolio

[1] Natixis ETF Trust II, *et al.,* Investment Company Act Rel. Nos. 33684 (November 14, 2019) (notice) and 33711 (December 10, 2019) (order). Applicants are not seeking relief under section 12(d)(1)(J) of the Act for an exemption from sections 12(d)(1)(A) and 12(d)(1)(B) of the Act (the ''Section 12(d)(1) Relief''), and relief under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act relating to the Section 12(d)(1) Relief, as granted in the Reference Order. Accordingly, to the extent the terms and conditions of the Reference Order relate to such relief, they are not incorporated by reference into the Order.

[2] To facilitate arbitrage, among other things, each day a Fund will publish a basket of securities and cash that, while different from the Fund's portfolio, is designed to closely track its daily performance.

Methodology. Because the relief requested is the same as certain of the relief granted by the Commission under the Reference Order and because the Initial Adviser has entered into a licensing agreement with NYSE Group, Inc. in order to offer Funds that utilize the NYSE Proxy Portfolio Methodology,[3] the Order would incorporate by reference the terms and conditions of the same relief of the Reference Order.

5. Applicants request that the Order apply to the Initial Fund and to any other existing or future registered open-end management investment company or series thereof that: (a) Is advised by the Initial Adviser or any entity controlling, controlled by, or under common control with the Initial Adviser (any such entity, along with the Initial Adviser, included in the term ''Adviser''); (b) offers exchange-traded shares utilizing active management investment strategies as contemplated by the Reference Order; and (c) complies with the terms and conditions of the Order and the terms and conditions of the Reference Order that are incorporated by reference into the Order (each such company or series and the Initial Fund, a ''Fund'').[4]

6. Section 6(c) of the Act provides that the Commission may exempt any person, security or transaction, or any class of persons, securities or transactions, from any provisions of the Act, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Section 17(b) of the Act authorizes the Commission to exempt a proposed transaction from section 17(a) of the Act if evidence establishes that the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and the transaction is consistent with the policies of the registered investment company and the general purposes of the Act. Applicants submit that for the reasons stated in the Reference Order the requested relief meets the exemptive standards under sections 6(c) and 17(b) of the Act.

[3] The NYSE Proxy Portfolio Methodology (as defined in the Reference Order) is the intellectual property of the NYSE Group, Inc.

[4] All entities that currently intend to rely on the Order are named as applicants. Any other entity that relies on the Order in the future will comply with the terms and conditions of the Order and the terms and conditions of the Reference Order that are incorporated by reference into the Order.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–28235 Filed 12–28–21; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93856; File No. SR–NSCC–2021–016]

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing of Proposed Rule Change To Enhance Capital Requirements and Make Other Changes

December 22, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 13, 2021, National Securities Clearing Corporation (''NSCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the clearing agency. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change consists of amendments to the Rules & Procedures (''Rules'') of NSCC in order to (i) enhance NSCC's capital requirements for Members and Limited Members (collectively, ''members''), (ii) redefine NSCC's Watch List and eliminate NSCC's enhanced surveillance list, and (iii) make certain other clarifying, technical and supplementary changes in the Rules, including definitional updates, to accomplish items (i) and (ii), as described in greater detail below.[3]

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the clearing agency included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The clearing agency has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to (i) enhance NSCC's capital requirements for Members and Limited Members (collectively, ''members''), (ii) redefine NSCC's Watch List and eliminate NSCC's enhanced surveillance list, and (iii) make certain other clarifying, technical and supplementary changes in the Rules, including definitional updates, to accomplish items (i) and (ii).

(i) Background

Central counterparties (''CCPs'') play a key role in financial markets by mitigating counterparty credit risk on transactions of their participants. CCPs achieve this by providing guaranties to participants and, as a consequence, are typically exposed to credit risks that could lead to default losses.

As a CCP, NSCC is exposed to the credit risks of its members. The credit risks borne by NSCC are mitigated, in part, by the capital maintained by members, which serves as a loss-absorbing buffer.

In accordance with Section 17A(b)(4)(B) of the Exchange Act,[4] a registered clearing agency such as NSCC may, among other things, deny participation to, or condition the participation of, any person on such person meeting such standards of financial responsibility prescribed by the rules of the registered clearing agency.

In furtherance of this authority, NSCC requires applicants and members to meet the relevant financial responsibility standards prescribed by the Rules. These financial responsibility standards generally require members to have and maintain certain levels of capital, as more particularly described in the Rules and below.

NSCC's capital requirements for its members have not been updated in over 20 years. Since that time, there have been significant changes to the financial markets that warrant NSCC revisiting its capital requirements. For example, the regulatory environment within which NSCC and its members operate has undergone various changes. The

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Capitalized terms not defined herein are defined in the Rules, *available at http://www.dtcc.com/~/media/Files/Downloads/legal/rules/nscc_rules.pdf.*

[4] 15 U.S.C. 78q–1(b)(4)(B).

implementation of the Basel III standards,[5] the designation of many banks as systemically important by the Financial Stability Board,[6] as well as the designation of NSCC as a systemically important financial market utility (''SIFMU'') by the Financial Stability Oversight Council,[7] have significantly increased the regulatory requirements, including capital requirements, of many financial institutions and CCPs. Similarly, the Covered Clearing Agency Standards (''CCAS'') adopted by the Commission have raised the regulatory standards applicable to CCPs such as NSCC.[8]

There also have been significant membership changes over the past 20 years. Numerous mergers, acquisitions, and new market entrants have created a diverse NSCC membership that has expanded the credit-risk profiles that NSCC must manage. For example, NSCC has seen an increase in less capitalized market participants focusing on niche parts of the market with innovative new business models.

Additionally, trading activity and market volatility, each of which present risk to NSCC, ballooned over the years.[9] While NSCC does collect margin from its members to help address these types of risk, it is imperative that NSCC ensure that its members have sufficient capital to sustain unexpected and/or sustained increases in margin requirements. Although the above factors do not directly require NSCC to increase capital requirements for its membership (*e.g.,* there is no specific regulation or formula that prescribes a set capital requirement for members of a CCP such as NSCC), the overarching and collective focus of the regulatory changes noted above, in light of the many heightened risks to the financial industry, has been to increase the stability of the financial markets in order to reduce systemic risk. As a self-regulatory organization, a SIFMU, and being exposed to the new and increased risks over the past 20 years, NSCC has a responsibility to do the same. Enhancing its capital requirements helps meet that responsibility and improve NSCC's credit risk management. Enhanced capital requirements also help mitigate other risks posed directly or indirectly by members such as legal risk, operational risk and cyber risk, as better capitalized members have greater financial resources in order to mitigate the effects of these and other risks.

As for setting the specific capital requirements proposed, again, there is no regulation or formula that requires or calculates a specific amount (*i.e.,* there is no magic number). Instead, NSCC considered several factors, including inflation and the capital requirements of other Financial Market Infrastructures, both in the U.S. and abroad, to which the proposed requirements align.[10] NSCC also gave much weight to the historical development of the proposal, which involved member outreach and feedback as far back as 2013.

In 2013, NSCC considered increasing its minimal capital requirements for members that self-clear and those that clear for others to much higher, fixed amounts than what are proposed here. However, some members expressed concerns that the amounts were too high and rigid, and would present undue burden on less capitalized firms. As such, NSCC then considered lowering the amounts considerably, such that the amounts would more directly reflect inflation but with an adjustment factor related to volume activity. In response, though, members expressed concern over the volume adjustment, which NSCC also determined to be too challenging and costly to implement, and too complex to monitor for both NSCC and members. Ultimately, NSCC settled on the current proposal, which it believes strikes the right balance between continuing to provide access for less capitalized firms and the need to mitigate risk to NSCC and its members, as described in more detail below.

NSCC also proposes to redefine the Watch List, which is a list of members that are deemed by NSCC to pose a heightened risk to it and its members based on credit ratings and other factors. As part of the redefinition of the Watch List, NSCC proposes to eliminate the separate enhanced surveillance list and implement a new Watch List that consists of a relatively smaller group of members that exhibit heightened credit risk, as described in more detail below.

Finally, NSCC proposes to make certain other clarification changes in the Rules.

(ii) Current NSCC Capital Requirements

The Rules currently specify capital requirements for members based on their membership type and type of entity. The current NSCC capital requirements for members are set forth in Addendum B (Qualifications and Standards of Financial Responsibility, Operational Capability and Business History),[11] as supplemented by Addendum O (Admission of Non-U.S. Entities as Direct NSCC Members) [12] in the case of non-U.S. entities.

Addendum B (Qualifications and Standards of Financial Responsibility, Operational Capability and Business History)

Addendum B is divided into 12 sections, one for each NSCC membership type. Each section of Addendum B sets forth the qualifications, financial responsibility, operational capability and business history requirements applicable to the relevant membership type.

An applicant for a membership type is required to meet the qualifications, financial responsibility, operational capability and business history requirements applicable to the relevant membership type, which may vary based on the applicant's type of entity (*e.g.,* a broker-dealer vs. a bank or trust company). In particular, financial responsibility requirements for a membership type, which generally require the applicant to maintain a certain level of capital, may vary based on an applicant's type of entity and the

[5] Basel Committee on Banking Supervision, The Basel Framework, *available at https://www.bis.org/basel_framework/index.htm?export=pdf* (''Basel III Standards'').

[6] *See* Financial Stability Board, 2021 list of global systemically important banks, *available at https://www.fsb.org/wp-content/uploads/P231121.pdf.*

[7] *See* U.S. Department of the Treasury, Designations, Financial Market Utility Designations, *available at https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/fsoc/designations.*

[8] 17 CFR 240.17Ad–22(e).

[9] *See, e.g.,* DTCC Annual Reports, *available at https://www.dtcc.com/about/annual-report.* NSCC is a wholly owned subsidiary of The Depository Trust & Clearing Corporation (''DTCC''). The DTCC Annual Reports highlight and track NSCC clearing activity year-over-year. *See also* CBOE Volatility Index (*i.e.,* the VIX) *available at https://www.cboe.com/tradable_products/vix/.* The VIX is designed to measure market volatility, highlights a rollercoaster of volatility over the past 14 years, including historic and near-historic peaks.

[10] *See* The Options Clearing Corporation, OCC Rules, Rule 301(a), *available at https://www.theocc.com/Company-Information/Documents-and-Archives/By-Laws-and-Rules* (requiring broker-dealers to have initial net capital of not less than $2,500,000); Chicago Mercantile Exchange Inc., CME Rulebook, Rule 970.A.1, *available at https://www.cmegroup.com/rulebook/CME/I/9/9.pdf* (requiring clearing members to maintain capital of at least $5 million, with banks required to maintain minimum tier 1 capital of at least $5 billion); LCH SA, LCH SA Clearing Rule Book, Section 2.3.2, *available at https://www.lch.com/resources/rulebooks/lch-sa* (requiring, with respect to securities clearing, capital of at least EUR 10 million for self-clearing members and at least EUR 25 million for members clearing for others, subject to partial satisfaction by a letter of credit) (1 EUR = $0.8150 as of December 31, 2020; *see https://www.fiscal.treasury.gov/reports-statements/treasury-reporting-rates-exchange/current.html* (last visited January 14, 2021)).

[11] Addendum B (Qualifications and Standards of Financial Responsibility, Operational Capability and Business History), *supra* note 3.

[12] Addendum O (Admission of Non-U.S. Entities as Direct NSCC Members), *supra* note 3.

relevant capital measure for such type of entity.

As relevant to NSCC's proposal to enhance its capital requirements for members:

Section 1

Section 1 of Addendum B sets forth the qualifications, financial responsibility, operational capability and business history requirements applicable to Members. The financial responsibility requirements in Section 1 consist of the following capital requirements:

Section 1.B.1 of Addendum B provides that a Registered Broker-Dealer applying to be a Member must have excess net capital (*i.e.,* capital in excess of the minimum net capital required by the Commission or such higher minimum capital required by its designated examining authority) in the amount of $500,000 if the Registered Broker-Dealer does not clear for others or $1 million if the Registered Broker-Dealer clears for others.

An applicant that is a Municipal Securities Brokers' Brokers (as defined in Rule 15c3–1(a)(8) under the Exchange Act) [13] is subject to a lower excess net capital requirement of $100,000.

Section 1.B.2 of Addendum B provides that a bank applying to be a Member must (i) have at least $50 million in equity capital (as defined on the Consolidated Report of Condition and Income (''Call Report'')) or (ii) have furnished to NSCC a guarantee of its parent bank holding company respecting the payment of any and all obligations of the bank applicant, and such parent bank holding company must have total consolidated capital of at least $50 million.

In the case of a trust company applying to be a Member that is not a bank but is a member of the Federal Reserve System or is an institution insured under the Federal Deposit Insurance Act, the trust company must have consolidated capital of at least $10 million and that is adequate to the scope and character of the business conducted by such trust company.

Section 1.B.3 of Addendum B provides that an entity applying to be a Member other than a Registered Broker-Dealer, bank or trust company is required to satisfy such minimum standards of financial responsibility as determined by NSCC.

Section 2

Section 2 of Addendum B sets forth the qualifications, financial responsibility, operational capability and business history requirements applicable to Mutual Fund/Insurance Services Members. The financial responsibility requirements in Section 2 consist of the following capital requirements:

Section 2.B.1 of Addendum B provides that a Registered Broker-Dealer applying to be a Mutual Fund/Insurance Services Member must have excess net capital in the amount of $50,000.

Section 2.B.2 of Addendum B provides that a bank or trust company applying to be a Mutual Fund/Insurance Services Member must (i) have a Tier 1 Risk Based Capital (''RBC'') ratio of 6% or greater or (ii) with respect to trust companies which do not calculate a Tier 1 RBC ratio, have at least $2 million in equity capital.

Section 2.B.3 of Addendum B provides that an Insurance Company applying to be a Mutual Fund/Insurance Services Member must have an RBC ratio, as derived from annual statutory financial statements filed by it with its supervisory or regulatory entity (or, between filings of such annual statutory financial statements, an RBC ratio derived in a similar manner from then-current financial data), of 250% or greater.

Section 2.B.4 of Addendum B provides that an entity applying to be a Mutual Fund/Insurance Services Member other than a Registered Broker-Dealer, bank or trust company or Insurance Company is required to satisfy such minimum standards of financial responsibility as determined by NSCC.

Section 3

Section 3 of Addendum B sets forth the qualifications, financial responsibility, operational capability and business history requirements applicable to Fund Members. The financial responsibility requirements in Section 3 consist of the following capital requirements:

Section 3.B.1 of Addendum B provides that a Registered Broker-Dealer applying to be a Fund Member must have excess net capital in the amount of $50,000.

Section 3.B.2 of Addendum B provides that a bank or trust company applying to be a Fund Member must (i) have a Tier 1 RBC ratio of 6% or greater or (ii) with respect to trust companies which do not calculate a Tier 1 RBC ratio, have at least $2 million in equity capital.

Section 3.B.3 of Addendum B provides that an investment company applying to be a Fund Member must have at least $100,000 in assets under management.

Section 3.B.4 of Addendum B provides that an investment adviser applying to be a Fund Member must have at least $25,000,000 in assets under management and $100,000 in total net worth.

Section 3.B.5 of Addendum B provides that an Insurance Company applying to be a Fund Member must have an RBC ratio, as derived from annual statutory financial statements filed by it with its supervisory or regulatory entity (or, between filings of such annual statutory financial statements, an RBC ratio derived in a similar manner from then-current financial data), of 250% or greater.

Section 3.B.6 of Addendum B provides that an entity applying to be a Fund Member other than a Registered Broker-Dealer, bank or trust company, investment company, investment adviser or Insurance Company is required to satisfy such minimum standards of financial responsibility as determined by NSCC.

Section 4

Section 4 of Addendum B sets forth the qualifications, financial responsibility, operational capability and business history requirements applicable to Insurance Carrier/Retirement Services Members. The financial responsibility requirements in Section 4 consist of the following capital requirement:

Section 4.B of Addendum B provides that an Insurance Company applying to be an Insurance Carrier/Retirement Services Member must have an RBC ratio, as derived from annual statutory financial statements filed by it with its supervisory or regulatory entity (or, between filings of such annual statutory financial statements, an RBC ratio derived in a similar manner from then-current financial data), of 250% or greater.

Section 7

Section 7 of Addendum B sets forth the qualifications, financial responsibility and operational capability requirements applicable to Settling Bank Only Members. The financial responsibility requirements in Section 7 consist of the following capital requirement:

Section 7.B of Addendum B provides that a bank or trust company applying to be a Settling Bank Only Member is required to satisfy such minimum standards of financial responsibility as determined by NSCC.

[13] 17 CFR 240.15c3–1(a)(8).

Addendum O (Admission of Non-U.S. Entities as Direct NSCC Members)

Addendum O (Admission of Non-U.S. Entities as Direct NSCC Members) provides that an entity that is organized in a country other than the United States and that is not otherwise subject to U.S. federal or state regulation (a ''non-U.S. entity'') is eligible to become a Member, Mutual Fund/Insurance Services Member, Fund Member or Insurance Carrier/Retirement Services Member, subject to certain conditions.

One of the conditions for a non-U.S. entity to be admitted as a Member, Mutual Fund/Insurance Services Member, Fund Member or Insurance Carrier/Retirement Services Member is that the entity must provide NSCC, for financial monitoring purposes, audited financial statements prepared in accordance with either U.S. generally accepted accounting principles (''U.S. GAAP'') or other generally accepted accounting principles that are satisfactory to NSCC.

In order to address the risk presented by the acceptance of financial statements not prepared in accordance with U.S. GAAP, Addendum O provides that the minimum financial requirements applicable to a non-U.S. entity will be subject to a specified premium, as follows:

i. For financial statements prepared in accordance with International Financial Reporting Standards, the U.K. Companies Act of 1985 (''U.K. GAAP''), or Canadian generally accepted accounting principles—a premium of 1½ times the minimum financial requirements;

ii. for financial statements prepared in accordance with a European Union country's generally accepted accounting principles, other than U.K. GAAP—a premium of 5 times the minimum financial requirements; and

iii. for financial statements prepared in accordance with any other type of generally accepted accounting principles—a premium of 7 times the minimum financial requirements.

Accordingly, a non-U.S. entity that does not prepare its financial statements in accordance with U.S. GAAP is required to meet financial requirements between 1½ to 7 times the minimum financial requirements that would otherwise be applicable to the non-U.S entity. Given that, as noted above, the financial responsibility requirements generally require a member to have a certain level of capital, Addendum O has the effect of requiring a non-U.S. entity that does not prepare its financial statements in accordance with U.S. GAAP to have capital between 1½ to 7 times the otherwise-applicable capital requirement.

(iii) Current NSCC Watch List and Enhanced Surveillance List

NSCC's Watch List is a list of members that are deemed by NSCC to pose a heightened risk to it and its members based on credit ratings and other factors.[14]

Specifically, the Watch List is the list of Members with credit ratings derived from NSCC's Credit Risk Rating Matrix (''CRRM'') [15] of 5, 6 or 7, as well as members that, based on NSCC's consideration of relevant factors, including those set forth in Section 4(d) of Rule 2B (Ongoing Membership Requirements and Monitoring),[16] are deemed by NSCC to pose a heightened risk to it and its members.

In addition to the Watch List, NSCC also maintains a separate list of members subject to enhanced surveillance in accordance with the provisions of Rule 2B, as discussed below. The enhanced surveillance list is a list of members for which NSCC has heightened credit concerns, which may include members that are already, or may soon be, on the Watch List. As described below, a member is subject to the same potential consequences from being subject to enhanced surveillance or being placed on the Watch List.

Rule 2B (Ongoing Membership Requirements and Monitoring)

Rule 2B (Ongoing Membership Requirements and Monitoring) specifies the ongoing membership requirements and monitoring applicable to members.[17]

Section 2.B.(e) of Rule 2B provides that NSCC may review the financial responsibility and operational capability of a Member and otherwise require from the Member additional reporting of its financial or operational condition in order to make a determination as to whether such Member should be placed on the Watch List and/or be subject to enhanced surveillance by NSCC consistent with the provisions of Section 4 of Rule 2B.

Section 4(b) of Rule 2B provides that a Member that is (1) a U.S. bank or trust company that files a Call Report, (2) a U.S. broker-dealer that files the Financial and Operational Combined Uniform Single Report (''FOCUS Report'') or the equivalent with its regulator, or (3) a non-U.S. bank or trust company that has audited financial data that is publicly available, will be assigned a credit rating by NSCC in accordance with the CRRM. A Member's credit rating is reassessed each time the Member provides NSCC with requested information pursuant to Section 2.B.(e) of Rule 2B or as may be otherwise required under the Rules.

Section 4(b) further provides that because the factors used as part of the CRRM may not identify all risks that a Member assigned a credit rating by NSCC may present to NSCC, NSCC may, in its discretion, override such Member's credit rating derived from the CRRM to downgrade the Member. This downgrading may result in the Member being placed on the Watch List and/or it may subject the Member to enhanced surveillance based on relevant factors.

Section 4(c) of Rule 2B provides that Members not assigned a credit rating by NSCC and Limited Members monitored and reviewed by NSCC on an ongoing and periodic basis will not be assigned a credit rating by the CRRM but may be placed on the Watch List and/or may be subject to enhanced surveillance based on relevant factors.

Section 4(d) of Rule 2B provides that the factors to be considered by NSCC in determining whether a member is placed on the Watch List and/or subject to enhanced surveillance include (i) news reports and/or regulatory observations that raise reasonable concerns relating to the member, (ii) reasonable concerns around the member's liquidity arrangements, (iii) material changes to the member's organizational structure, (iv) reasonable concerns about the member's financial stability due to particular facts and circumstances, such as material litigation or other legal and/or regulatory risks, (v) failure of the member to demonstrate satisfactory financial condition or operational capability or if NSCC has a reasonable concern regarding the member's ability to maintain applicable membership standards, and (vi) failure of the member to provide information required by NSCC to assess risk exposure posed by the member's activity.

[14] *See* Rule 1 (Definitions and Descriptions), *supra* note 3.

[15] NSCC's CRRM is a matrix of credit ratings of Members specified in Section 4 of Rule 2B. The CRRM is developed by NSCC to evaluate the credit risk Members pose to NSCC and its Members and is based on factors determined to be relevant by NSCC from time to time, which factors are designed to collectively reflect the financial and operational condition of a Member. These factors include (i) quantitative factors, such as capital, assets, earnings, and liquidity, and (ii) qualitative factors, such as management quality, market position/environment, and capital and liquidity risk management. *See* Rule 1 (Definitions and Descriptions), *supra* note 3.

[16] Rule 2B (Ongoing Membership Requirements and Monitoring), Section 4 (Ongoing Monitoring), *supra* note 3.

[17] Rule 2B (Ongoing Membership Requirements and Monitoring), *supra* note 3.

Section 4(e) of Rule 2B provides that NSCC may require a member that has been placed on the Watch List to make and maintain a deposit to the Clearing Fund over and above the amount determined in accordance with Procedure XV (Clearing Fund Formula and Other Matters) (which additional deposit shall constitute a portion of the member's Required Fund Deposit) or such higher amount as NSCC may deem necessary for the protection of it or other members.

Section 4(f) of Rule 2B provides that a member being subject to enhanced surveillance or being placed on the Watch List (1) will result in a more thorough monitoring of the member's financial condition and/or operational capability, including on-site visits or additional due diligence information requests, and (2) may be required make more frequent financial disclosures to NSCC. Members and Limited Members that are placed on the Watch List or subject to enhanced surveillance are also reported to NSCC's management committees and regularly reviewed by NSCC senior management.

(iv) Proposed Rule Changes

A. Changes To Enhance NSCC's Capital Requirements

As noted earlier, as a CCP, NSCC is exposed to the credit risks of its members. The credit risks borne by NSCC are mitigated, in part, by the capital maintained by members, which serves as a loss-absorbing buffer.

NSCC's financial responsibility standards for members generally require members to have and maintain certain levels of capital.

As described in more detail below, NSCC proposes to enhance its capital requirements for members as follows:

Members

U.S. Broker-Dealers

NSCC proposes increasing minimum excess net capital (''Excess Net Capital'') requirements for Members that are U.S. broker-dealers using a tiered approach.[18] These increases would be between 2 and 10 times the current minimum Excess Net Capital requirements applicable to Members that are U.S. broker-dealers, depending on whether the Member self-clears or clears for others and its VaR Tier, as described below. As described below, NSCC proposes to use, in general terms, calculations from its value-at-risk (''VaR'') model and associated Member charges as a measure of market risk in order to categorize Members into those that pose relatively minimal risk exposure, moderate risk exposure, or higher risk exposure to NSCC.

Unlike the current capital requirements applicable to Registered Broker-Dealers, the proposed enhanced capital requirements for U.S. broker-dealers would result in those Members whose NSCC activity poses greater risk to NSCC being required to have and maintain greater levels of Excess Net Capital in line with the increased risk.

As is the case with the current capital requirements applicable to Registered Broker-Dealers, the enhanced capital requirements for U.S. broker-dealers would depend on whether a Member self-clears or clears for others. A broker-dealer that clears transactions for others has the potential to present different and greater risks to NSCC than a broker-dealer that clears transactions only for itself, and it is therefore appropriate for such broker-dealer to be subject to heightened capital requirements versus a broker-dealer that clears transactions only for itself.

As described in more detail below, the proposed minimum Excess Net Capital increases will help ensure NSCC's ongoing compliance with regulatory requirements and expectations related to credit risk, such as those addressed in CCAS Rules 17Ad–22(e)(4)(i) and (e)(18).[19]

Under the proposal, a Member that is a U.S. broker-dealer must have and maintain at all times minimum Excess Net Capital as follows:

Clearing status	Value-at-risk tier (''VaR tier'')	Minimum excess net capital
Self-Clearing	<$100,000	$1 million Excess Net Capital
	$100,000–$500,000	2.5 million Excess Net Capital
	>$500,000	5 million Excess Net Capital
Clears for Others	<$100,000	2.5 million Excess Net Capital
	$100,000–$500,000	5 million Excess Net Capital
	>$500,000	10 million Excess Net Capital

The VaR Tier in the table above is based on the daily volatility component of a Member's Net Unsettled Positions calculated as of the start of each Business Day pursuant to Procedure XV of the Rules[20] as part of the Member's daily Required Fund Deposit. As part of the tiered approach, a Member's daily volatility component may exceed its then-current VaR Tier four times over a rolling 12-month period. Upon the fifth instance of the Member's daily volatility component exceeding its then-current VaR Tier, the Member would be moved to the next-greatest VaR Tier, unless the Member's daily volatility component also exceeded such next-greatest VaR Tier five times during the preceding 12-month period, in which case the Member would be moved to the greatest VaR Tier.

Upon moving to a greater VaR Tier, a Member would then have 60 calendar days from the date of the move to meet the higher required minimum Excess Net Capital for such VaR Tier. If a Member fails to meet its higher required minimum Excess Net Capital within 60 calendar days and maintain it for so long as such higher required minimum Excess Net Capital applies, NSCC may take any and all action against the Member pursuant to the Rules.

Upon moving to a greater VaR Tier, a Member would remain in that greater VaR Tier for no less than one continuous year from the date of the move before being eligible to move to a lesser VaR Tier. This does not in any way preclude a Member from moving to an even greater VaR Tier (if any) in accordance with the requirements of this proposal.

NSCC believes that allowing a Member's daily volatility component to exceed its then-current VaR Tier four times over a rolling 12-month period before the Excess Net Capital requirement would increase provides some flexibility for Members in the

[18] As part of the proposal, NSCC proposes to add the defined term ''Excess Net Capital'' to the list of defined terms in Rule 1. Excess Net Capital would be defined as a broker-dealer's excess net capital, calculated in accordance with such broker-dealer's regulatory and/or statutory requirements.

[19] 17 CFR 240.17Ad–22(e)(4)(i) and (e)(18).

[20] Procedure XV (Clearing Fund Formula and Other Matters), *supra* note 3.

event of occasional unexpected market volatility while also protecting NSCC from the risks of such increased daily volatility. NSCC has determined that giving a Member 60 calendar days from the date of its move to a higher VaR Tier to meet its higher required minimum Excess Net Capital appropriately balances the financial and other costs associated with requiring the Member to satisfy the higher required minimum Excess Net Capital with the increased risks posed by the Member's increased daily volatility. The 60-calendar day period also recognizes the practical limitations for a Member to be able to immediately increase its capital level, given that raising additional capital may require time for the Member to identify additional sources of capital such as outside investors, negotiate the terms of that capital, and execute any required legal documentation.

A Member would move to a lesser VaR Tier (if any) when (i) the Member has remained in its then-current VaR Tier for no less than one continuous year, (ii) the Member's daily volatility component did not exceed such lesser VaR Tier on five instances or more over the preceding 12-month period and (iii) if at any time the Member's daily volatility component did exceed such lesser VaR Tier on five instances or more over a rolling 12-month period, the Member has remained in its then-current VaR Tier for no less than one continuous year from the date of each such instance.

For example, if a Member's daily volatility component exceeds the lesser VaR Tier for the fifth time over a rolling 12-month period on February 1, 2021, then the Member would remain in its then-current VaR Tier until at least January 31, 2022. If the same Member's daily volatility component then exceeds the lesser VaR Tier for the sixth time over a rolling 12-month period on February 15, 2021, then the Member would remain in its then-current VaR Tier until at least February 14, 2022. This does not in any way preclude a Member from moving to an even greater VaR Tier (if any) in accordance with the requirements of this proposal.

Newly admitted Members would be placed into the applicable middle VaR Tier in the table above unless NSCC determines, based on information provided by or concerning the Member, that the Member's anticipated VaR Tier for its anticipated trading activity would be the greatest VaR Tier, in which case the Member would be placed into the greatest VaR Tier. Any such determination would be promptly communicated to, and discussed with, the Member. A newly admitted Member would remain in its initial VaR Tier until it moves to a different VaR Tier in accordance with the requirements of this proposal.

Based on its historical experience with the daily volatility components of newly admitted Members, including such Members' own projected trading activity,[21] NSCC believes that it would be appropriate to place newly admitted Members into the applicable middle VaR Tier in the table above for the first 12 months of membership unless NSCC has determined that the Member's anticipated VaR Tier based on its anticipated trading activity would be the greatest VaR Tier.

NSCC proposes to move the existing capital requirements for Members that are Municipal Securities Brokers' Brokers or Municipal Securities Brokers' Broker sponsored account applicants to the end of Section 1.B.1 of Addendum B with some clarifying changes to improve the accessibility and transparency of these capital requirements, without substantive effect.

U.S. Banks and Trust Companies

NSCC proposes to (1) change the measure of capital requirements for U.S. banks and trust companies from equity capital to common equity tier 1 capital (''CET1 Capital''),[22] (2) raise the minimum capital requirements for U.S. banks and trust companies, and (3) require U.S. banks and trust companies to be well capitalized (''Well Capitalized'') as defined in the capital adequacy rules and regulations of the Federal Deposit Insurance Corporation (''FDIC'').[23]

NSCC proposes to change the measure of capital requirements for U.S. banks and trust companies from equity capital to CET1 Capital and raise the minimum capital requirements for U.S. banks and trust companies in order to align NSCC's capital requirements with banking regulators' changes to regulatory capital requirements over the past several years, which have standardized and harmonized the calculation and measurement of bank capital and leverage throughout the world.[24] Consistent with these changes by banking regulators, NSCC believes that the appropriate capital measure for Members that are U.S. banks and trust companies should be CET1 Capital and that NSCC's capital requirements for Members should be enhanced in light of these increased regulatory capital requirements.

In addition, requiring U.S. banks and trust companies to be Well Capitalized ensures that Members are well capitalized while also allowing adjusted capital to be relative to either the risk-weighted assets or average total assets of the bank or trust company. NSCC proposes to have the definition of Well Capitalized expressly tied to the FDIC's definition of ''well capitalized'' to ensure that the proposed requirement that U.S. banks and trust companies be Well Capitalized will keep pace with future changes to banking regulators' regulatory capital requirements.

Under the proposal, a Member that is a U.S. bank or a U.S. trust company that is a bank must (1) have and maintain at all times at least $500 million in CET1 Capital and be Well Capitalized at all times or (2) have furnished to NSCC a guarantee of its parent bank holding company respecting the payment of any and all obligations of the Member, and such parent bank holding company must have and maintain at all times CET1 Capital of at least $500 million and be Well Capitalized at all times.

NSCC does not propose to change the existing capital requirements applicable to a Member that is a U.S. trust company that is not a bank, although NSCC is proposing to make some clarifying and conforming language changes to improve the accessibility and transparency of these capital requirements, without substantive effect.

NSCC treats U.S. trust companies that are banks and non-banks differently because they present different risks based on the attendant risks of their business activities, with trust companies engaging in banking activities (*e.g.,* receiving deposits and making loans) being subject to greater risks than trust companies that limit their activities to trust activities (*e.g.,* acting as a trustee,

[21] For example, if the proposed VaR Tiers had been in effect for the past two years (but newly admitted Members were not automatically placed in at least the middle VaR Tier), only one U.S. broker-dealer applicant would have belonged in the lowest VaR Tier at admittance, but that firm then had trading activity that placed it in the middle VaR Tier in the first month and the highest VaR Tier in the second month of membership. *See* Internal Tiering Analysis, included as a Confidential Exhibit 3 to the filing.

[22] Under the proposal, CET1 Capital would be defined as an entity's common equity tier 1 capital, calculated in accordance with such entity's regulatory and/or statutory requirements.

[23] *See* 12 CFR 324.403(b)(1).

[24] *Compare, e.g.,* 12 CFR 324.20(b) (FDIC's definition of CET1 Capital), and Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, Article 26, *available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R0575* (European Union's definition of CET1 Capital), with Basel Committee on Banking Supervision, Basel III Standards, CAP10.6, *supra* note 5 (Basel III Standards' definition of CET1 Capital).

other fiduciary or transfer agent/registrar).

Non-U.S. Broker-Dealers and Banks

NSCC proposes to impose a minimum capital requirement of $25 million in total equity capital for Members that are non-U.S. broker-dealers.

NSCC proposes to require a Member that is a non-U.S. bank (including a U.S. branch or agency) to (1) (A) have and maintain at all times at least $500 million in CET1 Capital and comply at all times with the minimum capital requirements (including, but not limited to, any capital conservation buffer, countercyclical buffer, and any D–SIB or G–SIB buffer, if applicable) and capital ratios required by its home country regulator, or, if greater, with such minimum capital requirements or capital ratios standards promulgated by the Basel Committee on Banking Supervision,[25] (B) provide an attestation for itself, its parent bank and its parent bank holding company (as applicable) detailing the minimum capital requirements (including, but not limited to, any capital conservation buffer, countercyclical buffer, and any D–SIB or G–SIB buffer, if applicable) and capital ratios required by their home country regulator, (C) provide, no less than annually and upon request by NSCC, an attestation for the Member, its parent bank and its parent bank holding company (as applicable) detailing the minimum capital requirements (including, but not limited to, any capital conservation buffer, countercyclical buffer, and any D–SIB or G–SIB buffer, if applicable) and capital ratios required by their home country regulator and (D) notify NSCC: (i) Within two Business Days of any of their capital requirements (including, but not limited to, any capital conservation buffer, countercyclical buffer, and any D–SIB or G–SIB buffer, if applicable) or capital ratios falling below any minimum required by their home country regulator; and (ii) within 15 calendar days of any such minimum capital requirement or capital ratio changing; or (2) (A) have furnished to NSCC a guarantee of its parent bank holding company respecting the payment of any and all obligations of the Member, (B) have such parent bank holding company maintain at all times CET1 Capital of at least $500 million and comply at all times with the minimum capital requirements (including, but not limited to, any capital conservation buffer, countercyclical buffer, and any D–SIB or G–SIB buffer, if applicable) and capital ratios required by its home country regulator, or, if greater, with such minimum capital requirements or capital ratios standards promulgated by the Basel Committee on Banking Supervision,[26] (C) provide an attestation for itself, its parent bank and its parent bank holding company (as applicable) detailing the minimum capital requirements (including, but not limited to, any capital conservation buffer, countercyclical buffer, and any D–SIB or G–SIB buffer, if applicable) and capital ratios required by their home country regulator, (D) provide, no less than annually and upon request by NSCC, an attestation for the Member, its parent bank and its parent bank holding company (as applicable) detailing the minimum capital requirements (including, but not limited to, any capital conservation buffer, countercyclical buffer, and any D–SIB or G–SIB buffer, if applicable) and capital ratios required by their home country regulator and (E) notify NSCC: (i) Within two Business Days of any of their capital requirements (including, but not limited to, any capital conservation buffer, countercyclical buffer, and any D–SIB or G–SIB buffer, if applicable) or capital ratios falling below any minimum required by their home country regulator, and (ii) within 15 calendar days of any such minimum capital requirement or capital ratio changing.

As described above, pursuant to Addendum O (Admission of Non-U.S. Entities as Direct NSCC Members),[27] the current minimum capital requirements for a Member, Mutual Fund/Insurance Services Member, Fund Member or Insurance Carrier/Retirement Services Member that does not prepare its financial statements in accordance with U.S. GAAP is subject to a multiplier that requires such member to have capital between 1½ to 7 times the otherwise-applicable capital requirement.

The multiplier was designed to account for the less transparent nature of accounting standards other than U.S. GAAP. However, accounting standards have converged over the years (namely International Financial Reporting Standards (''IFRS'') and U.S. GAAP).[28] As such, NSCC believes the multiplier is no longer necessary and its retirement would be a welcomed simplification for both NSCC and its members.

Accordingly, NSCC proposes to delete the language in Addendum O providing that the minimum capital requirements for a Member, Mutual Fund/Insurance Services Member, Fund Member or Insurance Carrier/Retirement Services Member that does not prepare its financial statements in accordance with U.S. GAAP is subject to a multiplier that requires such members to have capital between 1½ to 7 times the otherwise-applicable capital requirement. Instead, a Member, Mutual Fund/Insurance Services Member, Fund Member or Insurance Carrier/Retirement Services Member would be required to meet the minimum capital requirements provided in Addendum B for the applicable membership.

As described above, NSCC also proposes that non-U.S. banks be compliant with the minimum capital requirements and capital ratios in their home jurisdiction. Given the difficulty in knowing and monitoring compliance with various regulatory minimums for various jurisdictions, these Members would be required to provide NSCC with periodic attestations relating to the minimum capital requirements and capital ratios for their home jurisdiction.

NSCC also proposes to make some clarifying language changes to Addendum O to replace references to undefined capitalized terms and improve the accessibility of Addendum O, without substantive effect.

[25] *See* Basel Committee on Banking Supervision, Basel III Standards, *supra* note 5.

[26] *See id.*

[27] Addendum O applies to all entities that are organized in a country other than the U.S. and that are not otherwise subject to U.S. federal or state regulation (''non-U.S. entities''), other than insurance companies.

[28] The convergence between IFRS and U.S. GAAP began with the 2002 Norwalk Agreement. (*Available at https://www.ifrs.org/content/dam/ifrs/around-the-world/mous/norwalk-agreement-2002.pdf.*) Under that agreement, the Financial Accounting Standards Board (''FASB'') and the International Accounting Standards Board (''IASB'') signed a memorandum of understanding on the convergence of accounting standards. Between 2010 and 2013, FASB and IASB published several quarterly progress reports on their work to improve and achieve convergence of U.S. GAAP and IFRS. In 2013, the International Financial Reporting Standards Foundation established the Accounting Standards Advisory Forum (''ASAF'') to improve cooperation among worldwide standard setters and advise the IASB as it developed IFRS. (*See https://www.ifrs.org/groups/accounting-standards-advisory-forum/.*) FASB was selected as one of the ASAF's twelve members. FASB's membership on the ASAF helps represent U.S. interests in the IASB's standard-setting process and continues the process of improving and converging U.S. GAAP and IFRS. In February 2013, the Journal of Accountancy published its view of the success of the convergence project citing converged or partially converged standards, including business combinations, discontinued operations, fair value measurement, and share-base payments. (*Available at https://www.journalofaccountancy.com/issues/2013/feb/20126984.html.*) Subsequent to the publication, IASB and FASB converge on revenue recognition. While IASB and FASB have not achieved full convergence, NSCC believes the accounting rules are sufficiently aligned such that the multiplier is no longer required.

Other Types of Members

NSCC also proposes that (1) a Member that is (A) a national securities exchange registered under the Exchange Act and/or (B) a non-U.S. securities exchange or multilateral trading facility, must have and maintain at all times at least $100 million in equity capital, (2) a Member that is a broker-dealer that is acting as an Index Receipt Agent must have and maintain at all times minimum Excess Net Capital of $100 million, and (3) for a type of applicant or Member that is not otherwise addressed above, (A) such applicant or Member must maintain compliance with its home country regulator's minimum financial requirements at all times and (B) NSCC may, based on information provided by or concerning an applicant or Member, also assign minimum financial requirements to such applicant or Member based on how closely it resembles another membership type and its risk profile. Any such assigned minimum financial requirements would be promptly communicated to, and discussed with, the applicant or Member.

In the case of Index Receipt Agents, the higher capital requirement for this subset of Members is being proposed in order to reflect the systemic risk presented by the potential failure of an Index Receipt Agent. The failure of an Index Receipt Agent could present systemic risk because such failure could potentially result in disruptions at the exchange-traded funds (''ETFs'') for which the Index Receipt Agent acts. As a result of this systemic risk, Members acting as Index Receipt Agents require a moderately sized capital base to support this business function. Similarly, NSCC proposes to create a standard capital requirement for Members that are securities exchanges due to the systemic importance of these Members and the need to hold these Members to a consistent, high standard to ensure that they have sufficient capital to fulfill their systemically important role.

Limited Members

NSCC proposes that a Mutual Fund/Insurance Services Member, Fund Member or Settling Bank Only Member that is a U.S. bank or trust company that, in accordance with such entity's regulatory and/or statutory requirements, calculates a Tier 1 RBC Ratio must have at all times a Tier 1 RBC Ratio equal to or greater than the Tier 1 RBC Ratio that would be required for such entity to be Well Capitalized. As discussed above, NSCC proposes to have the definition of Well Capitalized expressly tied to the FDIC's definition of ''well capitalized'' to ensure that the proposed requirement that U.S. banks and trust companies be Well Capitalized will keep pace with future changes to banking regulators' regulatory capital requirements. Similarly, NSCC proposes to add a new defined term of ''Tier 1 RBC Ratio'' to Rule 1 in order to replace a reference to an undefined term in the Rules with its intended meaning. Under the proposal, Tier 1 RBC Ratio would be defined as the ratio of an entity's tier 1 capital to its total-risk weighted assets, calculated in accordance with such entity's regulatory and/or statutory requirements.

NSCC proposes to clarify existing language providing that a Mutual Fund/Insurance Services Member or Fund Member that is a U.S. trust company that does not calculate a Tier 1 RBC Ratio must have at least $2 million in equity capital, without substantive effect. Relatedly, NSCC proposes to revise the definition of ''RBC Ratio,'' which is used in the capital requirements for Mutual Fund/Insurance Services Members, Fund Members and Insurance Carrier/Retirement Services Members, in the list of defined terms in Rule 1 for clarity in order to replace a reference to an undefined capitalized term with its intended meaning and to remove unnecessary limitations on the types of entities and legal requirements to which the term RBC Ratio applies.

For a Limited Member that is a non-U.S. entity not described in the section of Addendum B that applies to such type of Limited Member, such entity would be required to satisfy such minimum standards of financial responsibility as determined in accordance with such section of Addendum B.

Other Proposed Changes to Addendum B

Introduction and General Changes

NSCC proposes to make it clear throughout Addendum B that following an applicant's admission to membership it is required to continue meeting the qualifications, financial responsibility, operational capability and business history requirements as applicable to its membership type.[29] Specifically, NSCC proposes to include references throughout Addendum B clarifying that such requirements apply to both applicants and members. NSCC also proposes to revise a sentence in the introduction and Sections 1.B, 2.B, 3.B and 4.B of Addendum B to correct language limited to applicant financial responsibility requirements.

NSCC also proposes to add the word ''requirements'' in one place in the introduction to improve readability.

NSCC proposes to clarify, without substantive effect, the existing language in Sections 2.B and 3.B of Addendum B that if a member is not of a type otherwise addressed in such section, it will be required to satisfy such minimum standards of financial responsibility as determined by NSCC. Any such assigned minimum financial requirements would be promptly communicated to, and discussed with, the member.

NSCC also proposes to add a sentence to the end of Sections 5.B and 6.B of Addendum B that any assigned minimum standards of financial responsibility for Municipal Comparison Only Members and Data Services Only Members, respectively, would be promptly communicated to, and discussed with, such members.

At the end of Sections 1.B, 2.B and 3.B of Addendum B, NSCC proposes to make explicit that, notwithstanding anything to the contrary in such section, an applicant or member must maintain compliance with its home country regulator's minimum financial requirements at all times.

Section 1

NSCC is proposing to revise the headings in Section 1.B referring to a Member's type of entity to read ''U.S. Broker-Dealers,'' ''U.S. Banks and Trust Companies,'' ''Non-U.S. Broker-Dealers and Banks,'' ''Securities Exchanges,'' ''Index Receipt Agents'' and ''Others,'' in conformity with the above-described changes to Member financial responsibility requirements.

Section 2

NSCC proposes to clarify and simplify the language describing the capital requirement for a Mutual Fund/Insurance Services Member that is a Registered Broker-Dealer or an Insurance Company, without substantive effect.

NSCC proposes to revise the heading ''Banks and trust companies'' in Section 2.B to read ''U.S. Banks and Trust Companies'' in conformity with the same change made in Section 1.B.

Section 3

NSCC proposes to clarify and simplify the language describing the capital requirement for a Fund Member that is a Registered Broker-Dealer, investment company, investment adviser or

[29] *See* Rule 2B (Ongoing Membership Requirements and Monitoring), Section 1 (Requirements), *supra* note 3.

Insurance Company, without substantive effect.

NSCC proposes to revise the heading ''Banks or trust companies'' in Section 3.B to read ''U.S. Banks and Trust Companies'' in conformity with the same changes made in Sections 1.B and 2.B.

Section 4

NSCC proposes to clarify and simplify the language describing the capital requirement for an Insurance Carrier/Retirement Services Member, without substantive effect.

Sections 5 through 12

As noted above, NSCC proposes to make it clear in Sections 5 through 12 of Addendum B that following an applicant's admission to membership it is required to continue meeting the qualifications, financial responsibility, operational capability and business history requirements as applicable to its membership type.

B. Changes to NSCC's Watch List and Enhanced Surveillance List

NSCC proposes to redefine the Watch List and eliminate the separate enhanced surveillance list and instead implement a new Watch List that consists of a relatively smaller group of members that pose heightened risk to NSCC and its members.

NSCC believes that the current system of having both a Watch List and an enhanced surveillance list (which include some of the same members) has confused various NSCC stakeholders, while the proposed approach, as NSCC understands from its experience, would be more consistent with industry practices and understanding of a ''Watch List.''

The new Watch List would include Members with a CRRM rating of 6 or 7, as well as members that are deemed by NSCC to pose a heightened risk to it and its members. The separate enhanced surveillance list would be merged into the new Watch List and references to the separate enhanced surveillance list would be deleted from the Rules.

In sum, the new Watch List would consist of members on the existing enhanced surveillance list, Members with a CRRM rating of 6 or 7, and any other members that are deemed by NSCC to pose a heightened risk to it and its members.

The proposed change will mean that Members with a CRRM rating of 5 would no longer automatically be included on the Watch List. Members with a CRRM rating of 5 represent the largest single CRRM rating category, but NSCC does not believe all such Members present heightened credit concerns.[30] Nevertheless, NSCC would continue to have the authority to place a Member on the new Watch List if it is deemed to pose a heightened risk to NSCC and its Members and/or to downgrade the CRRM rating of a Member.

NSCC also proposes to clarify in Section 4(f) of Rule 2B that members on the Watch List are reported to NSCC's management committees and regularly reviewed by NSCC's senior management.

C. Certain Other Clarification Changes

In connection with the above-described changes to the Rules to enhance NSCC's capital requirements for members and redefine the Watch List and eliminate the enhanced surveillance list, NSCC proposes to make certain other clarification changes in order to improve the accessibility and transparency of the Rules, as follows:

NSCC proposes to revise Section 4(g) of Rule 2B to clarify the relationship between NSCC and a parent bank holding company of a Member that has guaranteed the obligations of the Member in accordance with Addendum B, and to delete the unnecessary word ''affiliated'' when referring to a material banking subsidiary of such parent bank holding company.

NSCC proposes to clarify Rule 7, Section 4 [31] to state that a Member desiring to become an Index Receipt Agent shall first submit an application to be reviewed by NSCC.

NSCC also proposes to revise Section 1 of Rule 46 [32] to clarify the relationship between NSCC and a parent bank holding company of a Member that has guaranteed the obligations of the Member in accordance with Addendum B.

Member Outreach

Beginning in June 2019, NSCC conducted outreach to various Members in order to provide them with advance notice of the proposed enhancements to NSCC's capital requirements, the proposed redefinition of the Watch List, and the proposed elimination of the enhanced surveillance list. NSCC has been in communication with all Members whose current capital levels are either below the proposed minimum capital requirements or only slightly above the proposed requirements. Any such Members have been informed of the new requirement that would be in effect 12 months after approval of the proposed changes. Following approval, NSCC again would contact any Members that are either below or only slightly above the new minimum requirement to remind them of their new capital requirement and the 12-month grace period in which to come into compliance with the new requirement.

NSCC has received some written feedback from Members on the proposed enhancements to NSCC's capital requirements for certain Members, which are discussed in Item 4 below. The Commission will be notified of any additional written comments received.

NSCC has not conducted outreach to members providing them with advance notice of the proposed clarification changes to the Rules.

Implementation Timeframe

Pending Commission approval, NSCC would implement the proposed changes to enhance its capital requirements for members one year after the Commission's approval of this proposed rule change. During that one-year period, NSCC would periodically provide Members with estimates of their capital requirements, based on the approved changes, with more outreach expected for Members impacted by the changes. NSCC would inform a Member that is a U.S. broker-dealer (''BD Member'') if it exceeded its then-current VaR Tier, which may lead to the BD Member moving into a higher VaR Tier and, thus, being subject to a higher capital requirement. Same as the proposed, ongoing practice post-implementation, NSCC would provide the Member with a grace period of 60 days from the date of implementation to comply with the higher requirement.

The deferred implementation for all members and the estimated capital requirements for Members are designed to give members the opportunity to assess the impact of their enhanced capital requirements on their business profile and make any changes that they deem necessary to lower their capital requirement. All members would be advised of the implementation date of these proposed changes through issuance of an NSCC Important Notice,

[30] The majority of Members with a CRRM rating of 5 are either rated ''investment grade'' by external rating agencies or, in the absence of external ratings, NSCC believes are equivalent to investment grade, as many of these Members are primary dealers and large foreign banks. A firm with a rating of ''investment grade'' is understood to be better able to make its payment obligations compared to a firm with a lesser rating, such as a rating of ''speculative.'' As such, among the total population, firms with investment grade ratings are generally considered good credit risk along a credit risk scale.

[31] Rule 7 (Comparison and Trade Recording Operation), Section 4 (Index Receipt Agent), *supra* note 3.

[32] Rule 46 (Restrictions on Access to Services), Section 1, *supra* note 3.

posted to its website. NSCC also would inform firms applying for participation of the new capital requirements. Members and applicants should note that the methodology/processes used to set their initial capital requirements would be the same at implementation of the proposed changes as it would be on an ongoing basis.

NSCC expects to implement the proposed changes to redefine the Watch List and eliminate the enhanced surveillance list, as well as the clarification changes to the Rules, within 90 days of Commission approval. All members would be advised of such implementation through issuance of an NSCC Important Notice, posted to its website.

2. Statutory Basis

NSCC believes that the proposed rule change is consistent with the requirements of the Exchange Act, and the rules and regulations thereunder applicable to a registered clearing agency. Specifically, NSCC believes that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Exchange Act [33] and Rules 17Ad–22(b)(7), (e)(4)(i), (e)(18) and (e)(19),[34] each as promulgated under the Exchange Act, for the reasons described below.

Section 17A(b)(3)(F) of the Exchange Act requires, in part, that the Rules be designed to promote the prompt and accurate clearance and settlement of securities transactions.[35] As described above, the proposed rule changes would (1) enhance NSCC's capital requirements for members, (2) redefine the Watch List and eliminate the enhanced surveillance list, and (3) make clarification changes to the Rules. NSCC believes that enhancing its capital requirements for members, including continuing to recognize and account for varying Members and memberships, would help ensure that members maintain sufficient capital to absorb losses arising out of their clearance and settlement activities at NSCC and otherwise, and would help NSCC more effectively manage and mitigate the credit risks posed by its members, which would in turn help NSCC be better able to withstand such credit risks and continue to meet its clearance and settlement obligations to its members. Similarly, NSCC believes that redefining the Watch List and eliminating the enhanced surveillance list, as described above, would help NSCC better allocate its resources for monitoring the credit risks posed by its members, which would in turn help NSCC more effectively manage and mitigate such credit risks so that NSCC is better able to withstand such credit risks and continue to meet its clearance and settlement obligations to its members. NSCC believes that making clarification changes to the Rules would help ensure that the Rules remain clear and accurate, which would in turn help facilitate members' understanding of the Rules and provide members with increased predictability and certainty regarding their rights and obligations with respect to NSCC's clearance and settlement activities. Therefore, NSCC believes that these proposed rule changes would promote the prompt and accurate clearance and settlement of securities transactions, consistent with Section 17A(b)(3)(F) of the Exchange Act.

Rule 17Ad–22(b)(7) under the Exchange Act requires, in part, that NSCC establish, implement, maintain and enforce written policies and procedures reasonably designed to provide a person that maintains net capital equal to or greater than $50 million with the ability to obtain membership at NSCC, provided that NSCC may provide for a higher net capital requirement as a condition for membership if it demonstrates to the Commission that such a requirement is necessary to mitigate risks that could not otherwise be effectively managed by other measures.[36] As described above, NSCC proposes to enhance its capital requirements for members. NSCC believes that these proposed rule changes, while referencing capital measures other than net capital, would help ensure that members maintain sufficient capital to absorb losses arising out of their clearance and settlement activities at NSCC and otherwise, and would help NSCC more effectively manage and mitigate the credit risks posed by its members while providing fair and open access to membership at NSCC. NSCC believes that the proposed changes would utilize capital measures that are appropriately matched to the regulatory and other capital requirements applicable to the types of entities that apply for and have membership at NSCC, which would in turn help facilitate members' understanding of and compliance with NSCC's enhanced capital requirements. NSCC also believes that these other capital measures are more appropriate measures of the capital available to members to absorb losses arising out of their clearance and settlement activities at NSCC than simply net capital because a member's net capital alone may not be available to absorb losses arising out of such activities. Thus, relying on measures beyond net capital would help members more effectively understand and manage the resources available to mitigate the credit risks they pose to NSCC. In the case of those proposed rule changes that may require members such as U.S. banks and trust companies, non-U.S. banks, national securities exchanges, non-U.S. securities exchanges or multilateral trading facilities, or Index Receipt Agents to maintain capital greater than $50 million, NSCC believes that enhanced capital requirements for such members are necessary and appropriate in light of the regulatory and other capital requirements that such members face and the credit risks they pose to NSCC, which would help NSCC more effectively manage and mitigate such credit risks. Therefore, NSCC believes that the enhanced capital requirements for members are necessary to mitigate risks that could not otherwise be effectively managed by other measures, consistent with Rule 17Ad–22(b)(7) under the Exchange Act.

Rule 17Ad–22(e)(4)(i) under the Exchange Act requires that NSCC establish, implement, maintain and enforce written policies and procedures reasonably designed to effectively identify, measure, monitor, and manage its credit exposures to participants and those arising from its payment, clearing, and settlement processes, including by maintaining sufficient financial resources to cover its credit exposure to each participant fully with a high degree of confidence.[37] As described above, NSCC proposes to enhance its capital requirements for members, redefine the Watch List, and eliminate the enhanced surveillance list. NSCC believes that enhancing its capital requirements for members would help ensure that members maintain sufficient capital to absorb losses arising out of their clearance and settlement activities at NSCC and otherwise, which would in turn help NSCC more effectively manage and mitigate its credit exposures to its members and thereby help enhance the ability of NSCC's financial resources to cover fully NSCC's credit exposures to members with a high degree of confidence. NSCC believes that redefining the Watch List and eliminating the enhanced surveillance list would help NSCC better allocate its resources for monitoring its credit exposures to

[33] 15 U.S.C. 78q–1(b)(3)(F).

[34] 17 CFR 240.17Ad–22(b)(7), (e)(4)(i), (e)(18) and (e)(19).

[35] 15 U.S.C. 78q–1(b)(3)(F).

[36] 17 CFR 240.17Ad–22(b)(7).

[37] 17 CFR 240.17Ad–22(e)(4)(i).

members. By helping to better allocate resources, the proposal would in turn help NSCC more effectively manage and mitigate its credit exposures to its members, thereby helping to enhance the ability of NSCC's financial resources to cover fully NSCC's credit exposures to members with a high degree of confidence. Therefore, NSCC believes that its proposal to enhance its capital requirements for members, redefine the Watch List, and eliminate the enhanced surveillance list is consistent with Rule 17Ad–22(e)(4)(i) under the Exchange Act.

Rule 17Ad–22(e)(18) under the Exchange Act requires that NSCC establish, implement, maintain and enforce written policies and procedures reasonably designed to establish objective, risk-based, and publicly disclosed criteria for participation, which permit fair and open access by direct and, where relevant, indirect participants and other financial market utilities, require participants to have sufficient financial resources and robust operational capacity to meet obligations arising from participation in the clearing agency, and monitor compliance with such participation requirements on an ongoing basis.[38] As described above, NSCC proposes to enhance its capital requirements for members, redefine the Watch List, and eliminate the enhanced surveillance list. NSCC's proposed capital requirements would utilize objective measurements of member capital that would be fully disclosed in the Rules. The proposed capital requirements also would be risk-based and allow for fair and open access in that they would be based on the credit risks imposed by the member, such as its membership type, type of entity (including whether it is a non-U.S. entity), whether it self-clears or clears for others, and its VaR Tier. Accordingly, NSCC's proposed capital requirements would establish objective, risk-based and publicly disclosed criteria for membership, which would permit fair and open access by members. The proposed capital requirements also would ensure that members maintain sufficient capital to absorb losses arising out of their clearance and settlement activities at NSCC and otherwise, which would help ensure that they have sufficient financial resources to meet the obligations arising from their membership at NSCC. NSCC's proposed redefinition of the Watch List and the elimination of the enhanced surveillance list would help NSCC better allocate its resources for monitoring the credit risks posed by its members, including their ongoing compliance with NSCC's proposed enhancements to its capital requirements. Therefore, NSCC believes that its proposal to enhance its capital requirements for members, redefine the Watch List, and eliminate the enhanced surveillance list is consistent with Rule 17Ad–22(e)(18) under the Exchange Act.

Rule 17Ad–22(e)(19) under the Exchange Act requires that NSCC establish, implement, maintain and enforce written policies and procedures reasonably designed to identify, monitor, and manage the material risks to NSCC arising from arrangements in which firms that are indirect participants in NSCC rely on the services provided by direct participants to access NSCC's payment, clearing, or settlement facilities.[39] As described above, NSCC proposes to enhance its capital requirements for members, including U.S. broker-dealer Members that clear transactions for others. More specifically, the proposal would subject U.S. broker-dealer Members that clear transactions for others to heightened capital requirements versus U.S. broker-dealer Members that clear transactions only for themselves. NSCC believes that a broker-dealer Member that clears transactions for others (*i.e.,* a direct participant) can present additional risk because it could clear for a large number of correspondent clients (*i.e.,* indirect participants), which would expand the scope and volume of risk presented to NSCC and the direct participant itself when the indirect participant's trades are submitted to NSCC for settlement via the direct participant. The indirect nature of this risk exposure also increases risk to NSCC as there is generally less transparency into the indirect activity versus if the direct participant generated all of the activity itself. By requiring a U.S. broker-dealer Member that clears transactions for others to be subject to heightened capital requirements versus a U.S. broker-dealer Member that clears transactions only for itself, the proposal would help ensure that NSCC is able to better manage the material risks to NSCC arising from arrangements in which a Member clears transactions for others through NSCC. Therefore, NSCC believes that its proposal to enhance its capital requirements for members is consistent with Rule 17Ad–22(e)(19) under the Exchange Act.

(B) Clearing Agency's Statement on Burden on Competition

NSCC believes that the proposed rule change to enhance its capital requirements for BD Members could have an impact upon competition because some BD Members could be required to maintain capital in excess of their current capital levels. That impact could impose a burden on competition on some of those BD Members because they may bear higher costs to raise capital in order to comply with the enhanced capital requirements.

Consistent with that belief, NSCC received three written comments from three BD Members arguing that the proposed enhancements to the capital requirements for BD Members (''Proposed BD Requirements'') could negatively affect smaller BD Members.[40]

Two of the commenters argue that the Proposed BD Requirements will unfairly discriminate against small BD Members in favor of the largest BD Members,[41] with one of the commenters further arguing that mid-sized BD Member firms also will be discriminated against.[42] Similarly, a third commenter argues that, in addition to affecting small BD Members, the Proposed BD Requirements will drastically affect other industry participants and small companies that do business with and that rely on such BD Members to raise capital.[43]

Two of the commenters argue that the Proposed BD Requirements will create barriers to entry.[44] Moreover, one of those commenters argues that the barriers to entry will cause further industry consolidation,[45] while the other argues that the barriers are anticompetitive and, when considered with the argued effect on smaller broker-dealers, at odds with the goals of the Exchange Act.[46]

Regarding the proposed VaR Tiers for BD Members, one commenter suggests that the proposed tiering scale should

[38] 17 CFR 240.17Ad–22(e)(18).

[39] 17 CFR 240.17Ad–22(e)(19).

[40] Letter from Bonnie K. Wachtel, Chief Executive Officer, and Wendie L. Wachtel, Chief Operating Officer, Wachtel & Co., Inc. (September 16, 2019) (''Wachtel Letter''); Email from Samuel F. Lek, Lek Securities Corporation (September 17, 2019) (''Lek Email''); Email from William L. Walker, Chief Operating Officer, Wilson-Davis & Co., Inc. (October 31, 2019) (''Wilson-Davis Email''). Copies of the comments received have been included as Exhibit 2 to the filing, pursuant to the requirements of Form 19b–4 and the General Instructions for Form 19b–4, *available at https://www.sec.gov/about/forms/form19b-4.pdf.*

[41] Wachtel Letter, *supra* note 40; Lek Email, *supra* note 40.

[42] Wachtel Letter, *supra* note 40.

[43] Wilson-Davis Email, *supra* note 40.

[44] Wachtel Letter, *supra* note 40; Lek Email, *supra* note 40.

[45] Wachtel Letter, *supra* note 40.

[46] Lek Email, *supra* note 40.

not end at $5 million Excess Net Capital for a self-clearing BD Member with a daily volatility component of more than $500,000 for its Net Unsettled Positions; rather, the scale should continue indefinitely.[47] Meanwhile, another commenter suggests that the proposed $10 million in Excess Net Capital for a BD Member that clears for others is not necessary to address the risk presented by such BD Member because its required margin will be greater than $500,000 for its Net Unsettled Positions.[48] That same commenter also argues that the VaR Tiers are extremely low, which is an effort to target smaller BD Members and ignores the greater risk presented by larger BD Members.[49]

NSCC values each of its BD Members and does not wish to create a competitive burden on any of them or any of their clients. The Proposed BD Requirements were not designed to discriminate against any BD Members (small, medium, or large), create a barrier to NSCC membership, or force any BD Member to clear through another financial institution or exit the business completely. Rather, as discussed above and below, the Proposed BD Requirements were designed and tailored to help address the specific risks presented by BD Members within the current industry environment.

Nevertheless, NSCC fully appreciates that the Proposed BD Requirements may result in a burden on competition for some BD Members that would need to raise or keep more capital on hand in order to comply with the new requirements, although NSCC does not believe that any such burden on competition would be significant. In any event, to the extent the Proposed BD Requirements would be a burden on competition, NSCC believes that the burden would be necessary and appropriate in furtherance of the purposes of the Exchange Act, as permitted by Section 17A(b)(3)(I) thereunder.[50]

NSCC believes the Proposed BD Requirements are necessary because, in short, the current requirements are outdated. As noted above, the current minimum capital requirements for members have not been adjusted in over 20 years. Meanwhile, there have been significant changes to the industry (*e.g.,* market structure, technology, and regulatory environment) within which NSCC and all its members operate, exposing NSCC and its members to more and different risks than 20 years ago.

There also have been significant membership changes over the past 20 years. Numerous mergers, acquisitions, and new market entrants have created a diverse NSCC membership that has expanded the credit-risk profiles that NSCC must manage. For example, NSCC has seen an increase in less capitalized market participants focusing on niche parts of the market with innovative new business models.

Additionally, as mentioned above, trading activity and market volatility, each of which present risk to NSCC, ballooned over the years.[51] While NSCC does collect margin from its members to help address these types of risk, it is imperative that NSCC ensure that its members have sufficient capital to sustain unexpected and/or sustained increases in margin requirements. Although the above factors do not directly require NSCC to increase capital requirements for its membership (*e.g.,* there is no specific regulation or formula that prescribes a set capital requirement for members of a CCP such as NSCC), the overarching and collective focus of the regulatory changes noted above, in light of the many heightened risks to the financial industry, has been to increase the stability of the financial markets in order to reduce systemic risk. As a self-regulatory organization, a SIFMU, and being exposed to the new and increased risks over the past 20 years, NSCC has a responsibility to do the same. Enhancing its capital requirements helps meet that responsibility and improve NSCC's credit risk management.

Moreover, stress testing has also highlighted that BD Members with smaller capital bases are exposed to the risk of losses exceeding their current Excess Net Capital requirements under a stressed scenario.[52] There also has been heightened focus on legal, operational, and cyber risk, given the devastating impact that they could have today. In the case of legal risk, members can and do face legal exposures that exceed their required Excess Net Capital.[53] In the case of operational risk, unexpected operational events could expose NSCC to an amount in excess of a firm's required Excess Net Capital. In the case of cyber risk, cyber-attacks have the potential to inflict significant losses that could exceed the current minimum capital requirements.

Appreciation of these greater risks have manifested into new regulatory requirements for certain industry participants,[54] including NSCC, requiring NSCC to maintain greater capital amounts and deploy enhanced risk management tools.[55] As to which BD Members are arguably ''riskier'' in today's environment, NSCC's internal stress testing analysis [56] highlights that BD Members with smaller capital bases are more likely to experience a loss that would exceed their current Excess Net Capital requirements,[57] countering the commenter's argument that larger BD Members are riskier.[58]

Therefore, NSCC believes the Proposed BD Requirements are necessary in furtherance of the purposes of the Exchange Act, as permitted by Section 17A(b)(3)(I) thereunder,[59] as the proposed changes would help ensure that all BD Members maintain an amount of capital that is more commensurate with the current industry environment and the risks it presents.

NSCC believes the Proposed BD Requirements are appropriate for a variety of reasons. First, the new requirements are tailored to better reflect the volatility risk presented by BD Members. Currently, the minimum capital requirement for BD Members is simply an amount of Excess Net Capital based on membership type (*i.e.,* a $500,000 Excess Net Capital requirement for those that self-clear and a $1 million Excess Net Capital requirement for those that clear for others), without considering any other risks. As described above, NSCC would not only continue to consider membership type, but it also proposes to use the daily volatility component of the BD Member's own Net Unsettled Positions (*i.e.,* a measurement of the risk that the BD Member's Net Unsettled Positions present to NSCC) in order to more strategically group BD Members into tiers, with each tier being assigned a specific minimum capital requirement. BD Members in a greater tier would need to maintain higher capital requirements than those in a

[47] Wachtel Letter, *supra* note 40.

[48] Lek Email, *supra* note 40.

[49] *Id.*

[50] 15 U.S.C. 78q–1(b)(3)(I).

[51] *See supra* note 9.

[52] *See* Stress Testing Analysis, included as a Confidential Exhibit 3 to the filing.

[53] *See Commission* v. *Alpine Sec. Corp.,* 982 F.3d 68 (2d Cir. 2020) (upholding $12 million civil penalty against clearing broker-dealer).

[54] *See, e.g.,* Basel Committee on Banking Supervision, Basel III Standards, *supra* note 5; Financial Stability Board, 2020 list of G–SIBs, *supra* note 4; U.S. Department of the Treasury, Designations, Financial Market Utility Designations, *supra* note 7.

[55] *See, e.g.,* CCAS, *supra* note 10.

[56] *See supra* note 52.

[57] *See* Letter from Daniel McElligott, Executive Director, DTCC, to Regional Firms Council (October 24, 2019), included as a Confidential Exhibit 3 to the filing.

[58] Lek Email, *supra* note 40.

[59] 15 U.S.C. 78q–1(b)(3)(I).

lesser tier, commensurate with the volatility risks that the BD Members in each tier present to NSCC. As described above, BD Members could move between tiers based on sustained changes to their daily volatility component, thus allowing BD Members to have control over the tier in which they are placed and, in turn, the capital they need to maintain. NSCC would track VaR breaches for BD Members on a daily basis. On the first instance of breaching a VaR Tier, NSCC would send a letter to the Member informing it of the VaR breach and reminding it that four subsequent breaches within the next 12 months would result in a higher capital requirement. On the fifth instance of breaching a VaR Tier, NSCC would again send a letter to a Member informing it of the fifth breach and that the new, higher capital requirement would take effect in 60 days and would remain in effect for at least the next 12 months.

In the case of new applicants for NSCC membership, as described above, if the Proposed BD Requirements had been in effect for the past two years, but newly admitted BD Members were not automatically placed in at least the middle VaR Tier, only one BD Member would have belonged in the lowest VaR Tier at admittance, and that firm would have moved to the middle VaR Tier in its second month of membership.[60] As a result, requiring new BD Members to be placed in at least the middle VaR Tier at admittance would not pose an unnecessary barrier to entry that such BD Members would not have had to meet eventually anyway.

In response to specific comments that the VaR Tiers begin at too low of a level and that they should continue indefinitely,[61] NSCC designed the tier levels to not only consider the volatility risk that the BD Members present to NSCC but also to make the tiers easy to understand and manage. NSCC believes that adding more tiers at the upper levels, or splitting existing tiers, would complicate the structure unnecessarily and make the logistics in tracking each BD Member as they moved between tiers unwieldy, not only for NSCC but also for the BD Member itself. NSCC believes the proposed tier structure strikes the right balance between benefit and functionality.

Second, while NSCC believes members must understand the risks that their capitalization presents to NSCC and be prepared to monitor their capitalization and alter their behavior in order to minimize that risk, as necessary, NSCC also appreciates and understands that members must be able to plan for their capital requirements. That is why NSCC would not implement the proposed changes to any of the enhanced capital requirements until one year after the Commission's approval of the proposal. During that one-year period, NSCC would periodically provide Members with estimates of their capital requirements. The deferred implementation for all members and the estimated capital requirements for Members are designed to give members the opportunity to assess the impact of their enhanced capital requirements on their business profile and make any changes that they deem necessary.

Third, in response to the specific comment that the Proposed BD Requirements are at odds with the goals of the Exchange Act,[62] NSCC believes the proposed changes are, in fact, consistent with and would improve upon NSCC's compliance with applicable regulatory requirements, as discussed above, including Section 17A(b)(3)(F) of the Exchange Act and Rules 17Ad–22(b)(7), (e)(4)(i), (e)(18) and (e)(19) promulgated thereunder.

Finally, NSCC believes that the Proposed BD Requirements would better align NSCC's capital requirements for members with those of other CCPs, both in the U.S. and abroad.[63]

Therefore, NSCC believes the Proposed BD Requirements are appropriate in furtherance of the purposes of the Exchange Act, as permitted by Section 17A(b)(3)(I) thereunder,[64] as the proposed changes are purposely tailored and structured, provide for a one-year implementation period, are consistent with applicable provisions of the Exchange Act and rules thereunder, and better align with NSCC peers.

NSCC does not believe the proposed changes to enhance the capital requirements for its other members would impact competition because such members already meet the proposed requirements. Additionally, NSCC does not believe that the proposed changes to (i) redefine the Watch List and eliminate the enhanced surveillance list and (ii) make clarification changes to the Rules would impact competition. Redefining the Watch List and eliminating the enhanced surveillance list are simply intended to streamline and clarify these monitoring practices. If anything, by no longer automatically including Members with a CRRM rating of 5 on the Watch List, as proposed, the change could promote competition for such Members, as such Members would no longer automatically be subject to increased scrutiny by NSCC, including the possibility of increased financial and reporting obligations. Meanwhile, making clarification changes to the Rules to ensure that they remain accessible and transparent would help facilitate members' understanding of the Rules and provide members with increased predictability and certainty regarding their rights and obligations with respect to NSCC's clearance and settlement activities.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

All written comments received by NSCC have been summarized and responded to in Item 4 (Self-Regulatory Organization's Statement on Burden on Competition) above. If any additional written comments are received, NSCC will amend this filing to publicly file such comments as an Exhibit 2 to this filing, as required by Form 19b–4 and the General Instructions thereto.

Persons submitting written comments are cautioned that, according to Section IV (Solicitation of Comments) of the Exhibit 1A in the General Instructions to Form 19b–4, the Commission does not edit personal identifying information from comment submissions. Commenters should submit only information that they wish to make available publicly, including their name, email address, and any other identifying information.

All prospective commenters should follow the Commission's instructions on *How to Submit Comments*, available at *https://www.sec.gov/regulatory-actions/how-to-submit-comments.* General questions regarding the rule filing process or logistical questions regarding this filing should be directed to the Main Office of the Commission's Division of Trading and Markets at *tradingandmarkets@sec.gov* or 202–551–5777.

NSCC reserves the right to not respond to any comments received.

III. Date of Effectiveness of the Proposed Rule Change, and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which

[60] *See supra* note 21.

[61] Lek Email, *supra* note 40; Wachtel Letter, *supra* note 40.

[62] Lek Email, *supra* note 40.

[63] *See supra* note 10.

[64] 15 U.S.C. 78q–1(b)(3)(I).

the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Exchange Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NSCC–2021–016 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR–NSCC–2021–016. 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/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of NSCC and on DTCC's website (*https://dtcc.com/legal/sec-rule-filings.aspx*). All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NSCC–2021–016 and should be submitted on or before January 19, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[65]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–28250 Filed 12–28–21; 8:45 am]

BILLING CODE 8011–01–P

[65] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93862; File No. SR–NYSE–2021–76]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change To Amend the NYSE Listed Company Manual To Amend Certain of Its Listing and Annual Fees

December 22, 2021.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on December 20, 2021, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Sections 902.02, 902.03 and 902.11 of the NYSE Listed Company Manual (the ''Manual'') to amend certain of its listing fees. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend certain of its listing fees set forth in Chapter 9 of the Manual. Changes to initial listing fees will take effect immediately and changes to annual fees will take effect from the beginning of the calendar year commencing on January 1, 2022. The proposed amendments only reflect changes in the amounts charged for the initial listing of securities and on an annual basis thereafter and do not reflect any change in the services provided to the issuer in connection with such listing.

Currently, when an issuer first lists a class of common shares (*i.e.,* when an issuer lists a class of common shares and has no other class of common shares listed on the Exchange at the time of such listing), the Exchange charges listing fees for such class at a rate of $0.004 per share, subject to a minimum and maximum fee of $150,000 and $295,000, respectively. The Exchange also charges a one-time special fee of $50,000 which is included in the minimum and maximum fee. The Exchange proposes to replace the per share fee with a flat fee of $295,000 when an issuer first lists a class of common shares and eliminate the special one-time charge and minimum and maximum fee levels. The Exchange proposes to make conforming changes throughout Sections 902.02 and 902.03 of the Manual to eliminate references to the special one-time charge and the minimum and maximum listing fees. As the one-time charge is currently included in the maximum initial listing fee of $295,000 and all companies will be paying the maximum fee as a flat fee going forward, the Exchange is proposing to eliminate the one-time charge.[4] The Exchange also proposes to: (i) Revise the rules in several places to

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The first time an issuer lists an Equity Investment Tracking Stock (as defined in Section 102.07) that is the issuer's only class of common equity securities listed on the Exchange, the fee is a fixed amount of $100,000, which amount includes the special charge of $50,000. The proposed amendment would remove the reference to the inclusion of the $50,000 special charge from the fee provision in relation to Equity Investment Tracking Stocks, as a separate fee for those securities and the concept will no longer exist elsewhere in the rules.

make clear that the $295,000 flat fee is applicable only when an issuer lists a class of common shares and has no other class of common shares listed on the Exchange at the time of such listing and (ii) modify examples of how to calculate listing fees which are included in Section 902.03 to reflect the effect on those examples of the proposed flat initial listing fee. The Exchange also proposes to add text to Section 902.03 to note that the fees for Investment Company Units, streetTRACKS® Gold Shares, Currency Trust Shares, and Commodity Trust Shares are set forth in Section 902.07.

In addition, the Exchange proposes to change the annual fee set forth in Section 902.03 of the Manual from $0.00113 per share to $0.00117 per share for each of the following: A primary class of common shares (including Equity Investment Tracking Stocks); each additional class of common shares (including tracking stock); a primary class of preferred stock (if no class of common shares is listed); each additional class of preferred stock (whether primary class is common or preferred shares); and each class of warrants. In addition, the minimum annual fee will be increased from $71,000 to $74,000 for each of (i) a primary class of common shares (including Equity Investment Tracking Stocks) and (ii) a primary class of preferred stock (if no class of common shares is listed). The proposed increase in the per share rates and the minimum fees reflect increases in the costs the Exchange incurs in providing services to listed companies on an ongoing basis, as well as increases in the costs of conducting its related regulatory activities. The Exchange does not propose to increase the minimum annual fees charged for additional classes of common shares (including tracking stocks), preferred stocks that are not the primary listed equity security, or warrants. The Exchange believes that the benefits issuers receive in connection with those listings are consistent with the current minimum fee levels, as those types of listings do not generally entitle issuers to the types of services provided in connection with a primary common stock listing or primary preferred stock listing and the Exchange has therefore not incurred the same level of cost increase associated with them.

Section 902.03 includes a paragraph describing the application of the initial listing fee as currently in effect in the situation where a listed real estate investment trust (''REIT'') is structured as an umbrella partnership real estate investment trust (''UPREIT'') and the operating partnership through which the REIT holds its assets is also listed on the Exchange. In such cases, the initial listing fees are applied to those two issuers on a combined basis at the time of initial listing and the bill is divided between the two issuers so that the REIT will be billed an amount equal to the same percentage of the minimum or maximum fee amount as the REIT's ownership interest in the operating partnership represents of the total equity of the operating partnership. Consistent with the adoption of a flat initial listing fee of $295,000, the Exchange proposes to provide that the REIT will be billed an amount equal to the same percentage of the $295,000 flat fee as the REIT's ownership interest in the operating partnership represents of the total equity of the operating partnership.

Section 902.11 of the Manual currently provides for the application to an Acquisition Company's common shares and warrants of annual fees that are the same as fees for common shares set forth in Section 902.03 (with an aggregate annual limit of $85,000) and the fees set forth in Section 902.06 applicable to the warrants. The Exchange proposes to replace these fees for Acquisition Companies with a flat annual fee of $85,000 for calendar years starting on or after January 1, 2022. The flat annual fee would cover both an Acquisition Company's common shares and warrants, if any. Accordingly, an Acquisition Company's common shares and warrants will no longer be subject to the separate annual fee schedules applicable to those classes of securities in Sections 902.03 and 902.06 of the Manual, respectively.

The Exchange proposes to make the aforementioned fee increases in Section 902.03 to better reflect the value of such listing to issuers. In particular, the Exchange believes it is reasonable to apply a flat fee when an issuer first lists a class of common shares as the value to the issuer to listing are the same regardless of the number of shares the issuer has outstanding. The Exchange notes that the substantial majority of issuers that have recently listed on the Exchange paid the $295,000 maximum fee under the Exchange's current fee structure. Therefore, the adoption of a $295,000 flat initial listing fee will not result in an initial fee increase for most issuers. While some issuers would pay a higher initial listing fee under the proposed flat fee than under the current rate, the Exchange believes that this increase is not unfairly discriminatory, as the resources the Exchange expends in connection with the initial listing of those companies are typically consistent with the resources the Exchange expends on many companies that are already subject to the $295,000 maximum fee.

In addition, the Exchange observes that many issuers may not know their share structure or how many shares will ultimately be outstanding at the time they are considering whether to list on the Exchange. Therefore, the Exchange believes that adopting a flat initial fee and eliminating the special one-time charge will provide prospective issuers with greater transparency on the costs associated with initially listing on the Exchange.

The revised annual fees will be applied in the same manner to all issuers with listed securities in the affected categories and the changes will not disproportionately affect any specific category of issuers.

The proposed adoption of a flat annual fee for Acquisition Companies is in response to issuer feedback. Most Acquisition Companies issue a unit that contains a common share and fraction of a warrant. In most cases, the current fee schedules result in Acquisition Companies paying an annual fee equal to the existing $85,000 maximum. Adoption of a flat $85,000 annual fee for an Acquisition Company's common shares and warrants, if any, will therefore not result in an annual fee increase for most Acquisition Companies and will have the benefit of making the fee level easier to implement.

The proposed rule changes would not affect the Exchange's commitment of resources to its regulatory oversight of the listing process, or its regulatory programs.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[5] in general, and furthers the objectives of Section 6(b)(4)[6] of the Act, in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges. The Exchange also believes that the proposed rule change is consistent with Section 6(b)(5) of the Act,[7] in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(4).

[7] 15 U.S.C. 78f(b)(5).

and a national market system, and, in general, to protect investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Proposed Change Is Reasonable

The Exchange operates in a highly competitive marketplace for the listing of the various categories of securities affected by the proposed initial and annual fee adjustments. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS,[8] the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [9]

The Exchange believes that the ever-shifting market share among the exchanges with respect to new listings and the transfer of existing listings between competitor exchanges demonstrates that issuers can choose different listing markets in response to fee changes. Accordingly, competitive forces constrain exchange listing fees. Stated otherwise, changes to exchange listing fees can have a direct effect on the ability of an exchange to compete for new listings and retain existing listings.

Given this competitive environment, the adoption of a flat initial listing fee and small increase to the annual fees for various categories of equity securities represent a reasonable attempt to address the Exchange's increased costs in servicing these listings while continuing to attract and retain listings.

The Exchange proposes to make the aforementioned fee increases in Section 902.03 to better reflect the value of such listing to issuers. In particular, the Exchange believes it is reasonable to apply a flat fee when an issuer first lists a class of common shares as the value to the issuer to listing are the same regardless of the number of shares the issuer has outstanding. The Exchange notes that the substantial majority of issuers that have recently listed on the Exchange paid the $295,000 maximum fee under the Exchange's current fee structure. Therefore, the adoption of a $295,000 flat initial listing fee will not result in an initial fee increase for most issuers. While some issuers would pay a higher initial listing fee under the proposed flat fee than under the current rate, the Exchange believes that this increase is not unfairly discriminatory, as the resources the Exchange expends in connection with the initial listing of those companies are typically consistent with the resources the Exchange expends on many companies that are already subject to the $295,000 maximum fee. As the one-time charge is currently included in the maximum initial listing fee of $295,000 and all companies will be paying the current maximum fee as a flat fee going forward, the Exchange proposes to eliminate the one-time charge.

The Exchange does not propose to increase the minimum annual fees charged for additional classes of common shares (including tracking stocks), preferred stocks that are not the primary listed equity security, or warrants. The Exchange believes that the benefits issuers receive in connection with those listings are consistent with the current minimum fee levels, as those types of listings do not generally entitle issuers to the types of services provided in connection with a primary common stock listing or primary preferred stock listing.

The proposed adoption of a flat annual fee for Acquisition Companies is in response to issuer feedback. Most Acquisition Companies issue a unit that contains a common share and fraction of a warrant. In most cases, the current fee schedules result in Acquisition Companies paying an annual fee equal to the existing $85,000 maximum. Adoption of a flat $85,000 annual fee for an Acquisition Company's common shares and warrants, if any, will therefore not result in an annual fee increase for most Acquisition Companies and will have the benefit of making the fee level easier to implement. The Exchange does not provide Acquisition Companies with many of the services provided to listed companies that are operating companies until after their business combination is completed. Accordingly, the Exchange does not believe it is appropriate to increase annual fees for Acquisition Companies at this time.

The Proposal Is an Equitable Allocation of Fees

The Exchange believes its proposal equitably allocates its fees among its market participants.

The Exchange believes it is equitable to apply a flat fee when an issuer first lists a class of common shares. Under current rules, because of the existing minimum and maximum initial listing fees, the effective per-share initial listing fee is different for almost every issuer. Applying a flat initial listing fee to each issuer, therefore, equitably allocates fees among issuers.

The Exchange believes that the proposed amendments to the annual fees for equity securities are equitable because they do not change the existing framework for such fees, but simply increase certain of the minimum fees and per unit rates by a small amount to reflect increased operating costs. Similarly, as the fee structure remains effectively unchanged apart from small increases in the rates paid by all issuers, the changes to annual fees for equity securities neither target nor will they have a disparate impact on any particular category of issuer.

The Exchange believes it is equitable to apply a flat initial listing fee to all Acquisition Companies. In most cases, the current fee schedules result in Acquisition Companies paying an annual fee equal to the existing $85,000 maximum. Adoption of a flat $85,000 annual fee for an Acquisition Company's common shares and warrants, if any, will therefore not result in an annual fee increase for most Acquisition Companies and will have the benefit of making the fee level easier to implement.

The Proposal Is Not Unfairly Discriminatory

The Exchange believes that the proposal is not unfairly discriminatory. The proposed fee changes are not unfairly discriminatory because the same fee schedule will apply to all listed issuers. Further, the Exchange operates in a competitive environment and its fees are constrained by competition in the marketplace. Other venues currently list all of the categories of securities covered by the proposed fees and if a company believes that the Exchange's fees are unreasonable it can decide either not to list its securities or to list them on an alternative venue.

For the foregoing reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is designed to ensure that the fees charged by the Exchange accurately reflect the services provided and benefits realized by listed companies. The market for listing services is extremely competitive. Each listing exchange has a different fee

[8] Release No. 34–51808 (June 9, 2005); 70 FR 37496 (June 29, 2005).

[9] *See* Regulation NMS, 70 FR at 37499.

schedule that applies to issuers seeking to list securities on its exchange. Issuers have the option to list their securities on these alternative venues based on the fees charged and the value provided by each listing. Because issuers have a choice to list their securities on a different national securities exchange, the Exchange does not believe that the proposed fee changes impose a burden on competition.

Intramarket Competition

The proposed amended fees will be charged to all listed issuers on the same basis. The Exchange does not believe that the proposed amended fees will have any meaningful effect on the competition among issuers listed on the Exchange.

Intermarket Competition

The Exchange operates in a highly competitive market in which issuers can readily choose to list new securities on other exchanges and transfer listings to other exchanges if they deem fee levels at those other venues to be more favorable. Because competitors are free to modify their own fees in response, and because issuers may change their chosen listing venue, the Exchange does not believe its proposed fee change can impose any burden on intermarket competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2021–76 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–NYSE–2021–76. 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/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2021–76 and should be submitted on or before January 19, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–28252 Filed 12–28–21; 8:45 am]

BILLING CODE 8011–01–P

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93852; File No. SR–NASDAQ–2021–104]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Expiration Date of the Temporary Amendments Concerning Video Conference Hearings

December 22, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 17, 2021, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as constituting a ''non-controversial'' rule change under paragraph (f)(6) of Rule 19b–4 under the Act,[3] which renders the proposal effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the expiration date of the temporary amendments in SR–NASDAQ–2020–076 from December 31, 2021, to March 31, 2022.[4] The proposed rule change would not make any changes to the text of the Exchange rules.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/nasdaq/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] If the Exchange seeks to provide additional temporary relief from the rule requirements identified in this proposed rule change beyond March 31, 2022, the Exchange will submit a separate rule filing to further extend the temporary extension of time. The amended Exchange rules will revert to their original form at the conclusion of the temporary relief period and any extension thereof.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to continue to harmonize Exchange Rules 1015, 9261, 9524 and 9830 with recent changes by the Financial Industry Regulatory Authority, Inc. (''FINRA'') to its Rules 1015, 9261, 9524 and 9830 in response to the COVID–19 global health crisis and the corresponding need to restrict in-person activities. The Exchange originally filed proposed rule change SR–NASDAQ–2020–076, which allows the Exchange's Office of Hearing Officers (''OHO'') and the Exchange Review Council (''ERC'') to conduct hearings, on a temporary basis, by video conference, if warranted by the current COVID–19-related public health risks posed by an in-person hearing. In August 2021, the Exchange filed a proposed rule change, SR–NASDAQ–2021–067, to extend the expiration date of the temporary amendments in SR-NASDAQ–2020–076 from August 31, 2021, to December 31, 2021.[5] While there are signs of improvement, much uncertainty remains for the coming months. The presence of the Delta variant, dissimilar vaccination rates throughout the United States, and the uptick in transmissions in many locations indicate that COVID–19 remains an active and real public health concern.[6] Due to the uncertainty and the lack of a clear timeframe for a sustained and widespread abatement of COVID–19-related health concerns and corresponding restrictions,[7] the Exchange believes that there is a continued need for temporary relief beyond December 31, 2021. Accordingly, the Exchange proposes to extend the expiration date of the temporary rule amendments in SR–NASDAQ–2020–076 from December 31, 2021, to March 31, 2022.

On November 5, 2020, the Exchange filed, and subsequently extended to December 31, 2021, SR–NASDAQ–2020–076, to temporarily amend Exchange Rules 1015, 9261, 9524 and 9830 to grant OHO and the ERC authority[8] to conduct hearings in connection with appeals of Membership Application Program decisions, disciplinary actions, eligibility proceedings and temporary and permanent cease and desist orders by video conference, if warranted by the COVID–19-related public health risks posed by an in-person hearing.[9]

As set forth in the previous filings, the Exchange also relies on COVID–19 data and the guidance issued by public health authorities to determine whether the current public health risks presented by an in-person hearing may warrant a hearing by video conference.[10] Based on that data and guidance, the Exchange does not believe the COVID–19-related health concerns necessitating this relief will meaningfully subside by December 31, 2021, and believes that there will be a continued need for this temporary relief beyond that date. Accordingly, the Exchange proposes to extend the expiration date of the temporary rule amendments originally set forth in SR–NASDAQ–2020–076 from December 31, 2021, to March 31, 2022. The extension of these temporary amendments allowing for specified OHO and ERC hearings to proceed by video conference will allow the Exchange's critical adjudicatory functions to continue to operate effectively in these extraordinary circumstances—enabling the Exchange to fulfill its statutory obligations to protect investors and maintain fair and orderly markets—while also protecting the health and safety of hearing participants.

The Exchange has filed the proposed rule change for immediate effectiveness and has requested that the SEC waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing, so the Exchange can implement the proposed rule change immediately.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[11] in general, and furthers the objectives of Section 6(b)(5) of the Act,[12] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest, by continuing to provide greater harmonization between the Exchange rules and FINRA rules of similar

[5] *See* Securities Exchange Act Release No. 92911 (September 9, 2021), 86 FR 51395 (September 15, 2021) (Notice of Filing and Immediate Effectiveness of File No. SR–NASDAQ–2021–067).

[6] For example, President Joe Biden on July 29, 2021, announced several measures to increase the number of people vaccinated against COVID–19 and to slow the spread of the Delta variant, including strengthening safety protocols for federal government employees and contractors. *See https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/29/fact-sheet-president-biden-to-announce-new-actions-to-get-more-americans-vaccinated-and-slow-the-spread-of-the-delta-variant/.* Thereafter, the Biden Administration announced on November 4, 2021, details of two major vaccination policies to further help fight COVID–19. *See https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/04/fact-sheet-biden-administration-announces-details-of-two-major-vaccination-policies/.* Most recently, President Biden announced several new actions to help protect Americans against the Delta and Omicron variants. *See https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/02/fact-sheet-president-biden-announces-new-actions-to-protect-americans-against-the-delta-and-omicron-variants-as-we-battle-covid-19-this-winter/.*

[7] For instance, the Centers for Disease Control and Prevention (''CDC'') recently announced that the first confirmed case of COVID–19 caused by the Omicron variant was detected in the United States. *See https://www.cdc.gov/media/releases/2021/s1201-omicron-variant.html.* The CDC also recommends that fully vaccinated people wear a mask in public indoor settings in areas of substantial or high transmission and noted that fully vaccinated people might choose to wear a mask regardless of the level of transmission, particularly if they are immunocompromised or at increased risk for severe disease from COVID–19. *See https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html.* Furthermore, numerous states currently have COVID–19 restrictions in place. Six states (Hawaii, Illinois, Nevada, New Mexico, Oregon, and Washington) require most people to wear masks in indoor public places regardless of vaccination status, and three states (California, Connecticut, and New York) have mask mandates in indoor public places for those individuals who are unvaccinated. Several other states have mask mandates in certain settings, such as healthcare facilities, schools, and correctional facilities.

[8] For OHO hearings under Exchange Rules 9261 and 9830, the proposed rule change temporarily grants authority to the Chief or Deputy Chief Hearing Officer to order that a hearing be conducted by video conference. For ERC hearings under Exchange Rules 1015 and 9524, this temporary authority is granted to the ERC or relevant Subcommittee.

[9] *See* Securities Exchange Act Release No. 90390 (November 10, 2020), 85 FR 73302 (November 17, 2020) (Notice of Filing and Immediate Effectiveness of File No. SR–NASDAQ–2020–076); Securities Exchange Act Release No. 90774 (December 22, 2020), 85 FR 86614 (December 30, 2020) (Notice of Filing and Immediate Effectiveness of File No. SR–NASDAQ–2020–092); *supra* note 5.

[10] As noted in SR–NASDAQ–2020–076, the temporary proposed rule change grants discretion to OHO and the ERC to order a video conference hearing. In deciding whether to schedule a hearing by video conference, OHO and the ERC may consider a variety of other factors in addition to COVID–19 trends.

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

purpose,[13] resulting in less burdensome and more efficient regulatory compliance.

The proposed rule change, which extends the expiration date of the temporary amendments to the Exchange rules set forth in SR–NASDAQ–2020–076, will continue to aid the Exchange's efforts to timely conduct hearings in connection with its core adjudicatory functions. Given the current and frequently changing COVID–19 conditions and the uncertainty around when those conditions will see meaningful, widespread, and sustained improvement, without this relief allowing OHO and ERC hearings to proceed by video conference, the Exchange might be required to postpone some or almost all hearings indefinitely. The Exchange must be able to perform its critical adjudicatory functions to fulfill its statutory obligations to protect investors and maintain fair and orderly markets. As such, this relief is essential to the Exchange's ability to fulfill its statutory obligations and allows hearing participants to avoid the serious COVID–19-related health and safety risks associated with in-person hearings.

Among other things, this relief will allow OHO to conduct temporary cease and desist proceedings by video conference so that the Exchange can take immediate action to stop ongoing customer harm and will allow the ERC to timely provide members, disqualified individuals and other applicants an approval or denial of their applications. As set forth in detail in SR–NASDAQ–2020–076, this temporary relief allowing OHO and ERC hearings to proceed by video conference accounts for fair process considerations and will continue to provide fair process while avoiding the COVID–19-related public health risks for hearing participants. Accordingly, the proposed rule change extending this temporary relief is in the public interest and consistent with the Act's purpose.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the temporary proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. As set forth in SR–NASDAQ–2020–076, the proposed rule change is intended solely to extend temporary relief necessitated by the continued impacts of the COVID–19 outbreak and the related health and safety risks of conducting in-person activities. The Exchange believes that the proposed rule change will prevent unnecessary impediments to its operations, including its critical adjudicatory processes, and its ability to fulfill its statutory obligations to protect investors and maintain fair and orderly markets that would otherwise result if the temporary amendments were to expire on December 31, 2021.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act[14] and subparagraph (f)(6) of Rule 19b–4 thereunder.[15]

A proposed rule change filed under Rule 19b–4(f)(6)[16] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[17] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange has indicated that the proposed rule change to extend the expiration date will continue to prevent unnecessary impediments to its operations, including its critical adjudicatory processes, and its ability to fulfill its statutory obligations to protect investors and maintain fair and orderly markets that would otherwise result if the temporary amendments were to expire on December 31, 2021.[18] Importantly, the Exchange has also stated that extending the temporary relief provided in SR–NASDAQ–2020–076 immediately upon filing and without a 30-day operative delay will allow the Exchange to continue critical adjudicatory and review processes in a reasonable and fair manner and meet its critical investor protection goals, while also following best practices with respect to the health and safety of its employees.[19] The Commission also notes that this proposal extends without change the temporary relief previously provided by SR–NASDAQ–2020–076.[20] As proposed, the temporary changes would be in place through March 31, 2022 and the amended rules will revert back to their original state at the conclusion of the temporary relief period and, if applicable, any extension thereof.[21] For these reasons, the Commission believes that waiver of the 30-day operative delay for this proposal is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[22]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

[13] *See* Securities Exchange Act Release No. 93758 (December 13, 2021) (SR–FINRA–2021–031).

[14] 15 U.S.C. 78s(b)(3)(A)(iii).

[15] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[16] 17 CFR 240.19b–4(f)(6).

[17] 17 CFR 240.19b–4(f)(6)(iii).

[18] *See supra* Item II.

[19] *See* Securities Exchange Act Release No. 93758 (December 13, 2021); 86 FR 71695, 71696 (December 17, 2021) (noting the same in granting FINRA's request to waive the 30-day operative delay so that SR–FINRA–2021–031 would become operative immediately upon filing).

[20] *See supra* note 9.

[21] *See supra* note 4. As noted above, the Exchange states that if it requires temporary relief from the rule requirements identified in this proposal beyond March 31, 2022, it may submit a separate rule filing to extend the effectiveness of the temporary relief under these rules.

[22] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2021–104 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–NASDAQ–2021–104. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2021–104 and should be submitted on or before January 19, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–28247 Filed 12–28–21; 8:45 am]

BILLING CODE 8011–01–P

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93849; File No. SR–NYSE–2021–74]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change Proposes To Amend the Provisions of Rule 7.35B

December 22, 2021.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on December 14, 2021, New York Stock Exchange LLC (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the provisions of Rule 7.35B relating to the cancellation of MOC, LOC, and Closing IO Orders before the Closing Auction. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 7.35B (DMM-Facilitated Closing Auctions). Specifically, the Exchange proposes to modify Rule 7.35B(f)(2), which sets forth rules pertaining to the cancellation of MOC, LOC, and Closing IO Orders before the Closing Auction Imbalance Freeze, and make conforming changes to Rule 7.35B(j)(2)(B).

Rule 7.35B(f) provides that the Auction Imbalance Freeze for the Closing Auction will begin at the Closing Auction Imbalance Freeze Time and specifies how order entry and cancellation will be processed during the Closing Auction Imbalance Freeze.[4] Rule 7.35B(f)(2)(A) currently provides that, between the beginning of the Auction Imbalance Freeze and two minutes before the scheduled end of the Core Trading Hours, MOC, LOC, and Closing IO Orders [5] may be cancelled or reduced in size only to correct a Legitimate Error.[6] Rule 7.35B(f)(2)(B) currently specifies that, except as provided for in Rule 7.35B(j)(2)(B),[7] a request to cancel, cancel and replace, or reduce in size a MOC, LOC, or Closing IO Order entered two minutes or less before the scheduled end of the Core Trading Hours will be rejected.

The Exchange proposes to modify Rule 7.35B(f)(2) to provide that any requests to cancel, cancel and replace, or reduce in size a MOC, LOC, or Closing IO Order that are entered between the beginning of the Auction Imbalance Freeze and the scheduled end of Core Trading Hours would be rejected. That is, requests to cancel, replace, and/or reduce in size a MOC, LOC, or Closing IO Order must be received prior to the beginning of the Auction Imbalance Freeze (*i.e.,* 10

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The ''Auction Imbalance Freeze'' is the period that begins before the scheduled time for an Auction. *See* Rule 7.35(a)(3). ''Auction'' means the process for the opening, reopening, or closing of the trading of Auction-Eligible Securities on the Exchange, and an ''Auction-Eligible Security'' is a security for which the Exchange is the primary listing market. *See* Rules 7.35(a)(1) and 7.35(a)(2). The ''Closing Auction'' is the Auction that closes trading at the end of the Core Trading Session, and the ''Closing Auction Imbalance Freeze Time'' is 10 minutes before the scheduled end of Core Trading Hours. *See* Rules 7.35(a)(1)(C) and 7.35(a)(8).

[5] A ''MOC Order'' or ''Market-on-Close Order'' is a Market Order that is to be traded only during a closing auction. *See* Rule 7.31(c)(2)(B). A ''LOC Order'' or ''Limit-on-Close Order'' is a Limit Order that is to be traded only during a closing auction. *See* Rule 7.31(c)(2)(A). A ''Closing IO Order'' or ''Closing Imbalance Offset Order'' is a Limit Order to buy (sell) an in an Auction-Eligible Security that it to be traded only in a Closing Auction. *See* Rule 7.31(c)(2)(D).

[6] ''Legitimate Error'' means an error in any term of an order, such as price, number of shares, side of the transaction (buy or sell), or identification of the security. *See* Rule 7.35(a)(13).

[7] Rule 7.35B(j)(2)(B) currently specifies the circumstances under which the Exchange may temporarily suspend the prohibition on canceling an MOC or LOC Order in connection with the Closing Auction.

minutes prior to the scheduled end of Core Trading Hours), even in the case of a Legitimate Error. To facilitate this change, the Exchange proposes to delete current Rule 7.35B(f)(2)(A) and modify current Rule 7.35B(f)(2)(B) to replace the reference to ''two minutes or less before'' with ''from the beginning of the Auction Imbalance Freeze until,'' in relation to the scheduled end of Core Trading Hours. The Exchange also proposes to renumber current Rule 7.35B(f)(2)(B) as Rule 7.35B(f)(2).[8]

The Exchange proposes conforming changes to Rule 7.35B(j)(2)(B) to reflect the proposed changes to Rule 7.35B(f)(2), described above. Rule 7.35B(j)(2)(B) currently provides that the Exchange may temporarily suspend the prohibition on cancelling an MOC or LOC Order after two minutes before the scheduled end of Core Trading Hours when (1) the cancellation is necessary to correct a Legitimate Error, or (2) the execution of such an MOC or LOC Order would cause significant price dislocation at the close. To make Rule 7.35B(j)(2)(B) consistent with the proposed changes to Rule 7.35B(f)(2), the Exchange proposes to (1) replace the reference to ''two minutes before the scheduled end of Core Trading Hours'' with ''the beginning of the Auction Imbalance Freeze,'' and (2) replace the reference to ''paragraph (f)(2)(B)'' with ''paragraph (f)(2).'' Thus, Rule 7.35B(j)(2)(B), as amended, will provide that the Exchange may temporarily suspend the prohibition on cancelling an MOC or LOC Order after the beginning of the Auction Imbalance Freeze (as such prohibition will be set forth in Rule 7.35B(f)(2), as amended).

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934,[9] in general, and furthers the objectives of Section 6(b)(5),[10] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to remove impediments to and perfect the mechanism of a free and open market and, in general, protect investors and the public interest because it would streamline the Exchange's processing of MOC, LOC, and Closing IO Orders in connection with the Auction Imbalance Freeze. Specifically, rather than permitting MOC, LOC, and Closing IO Orders to be cancelled, replaced, and/or reduced in size for the limited purpose of correcting a Legitimate Error up until two minutes before the scheduled end of Core Trading Hours, the Exchange proposes to modify Rule 7.35B(f)(2) to provide that requests to cancel, cancel and replace, or reduce in size such orders would be rejected after the beginning of the Auction Imbalance Freeze. The Exchange notes that, since August 2021, it has not received any requests to cancel, cancel and replace, or reduce in size an MOC, LOC, or Closing IO Order between the beginning of the Auction Imbalance Freeze and two minutes before the scheduled end of Core Trading Hours. Accordingly, the Exchange believes that the proposed rule change would also remove impediments to and perfect the mechanism of a free and open market by providing greater determinism of the Closing Auction Imbalance Information because MOC, LOC, and Closing IO Orders would not be eligible to be cancelled once the Auction Imbalance Freeze begins for any reason. The proposed change would also eliminate a provision in Exchange rules that is not used by Members, thereby simplifying the Exchange's rules and better aligning its rules with the behavior of its Members.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change would apply to the processing of all MOC, LOC, and Closing IO Orders during the Auction Imbalance Freeze and thus would not create any undue burden on competition. Moreover, as described above, the Exchange has not received any requests to cancel, cancel and replace, or reduce in size a MOC, LOC, or Closing IO Order between the beginning of the Auction Imbalance Freeze and two minutes before the scheduled end of Core Trading Hours since August 2021 and thus believes that modifying Rule 7.35B(f)(2) and making conforming changes to Rule 7.35B(j)(2)(B) to permit such requests only up until the beginning of the Auction Imbalance Freeze would not impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSE–2021–74 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–NYSE–2021–74. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written

[8] The Exchange also proposes a non-substantive formatting change to italicize the heading of Rule 7.35B(f)(2).

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2021–74 and should be submitted on or before January 19, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–28244 Filed 12–28–21; 8:45 am]

BILLING CODE 8011–01–P

[11] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #17289 and #17290; Alabama Disaster Number AL–00125]

Presidential Declaration of a Major Disaster for the State of Alabama

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for the State of Alabama (FEMA–4632–DR), dated 12/21/2021.

Incident: Severe Storms and Flooding.

Incident Period: 10/06/2021 through 10/07/2021.

DATES: Issued on 12/21/2021.

Physical Loan Application Deadline Date: 02/21/2022.

Economic Injury (EIDL) Loan Application Deadline Date: 09/21/2022.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 12/21/2021, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties (Physical Damage and Economic Injury Loans): Jefferson, Shelby.

Contiguous Counties (Economic Injury Loans Only):

Alabama: Bibb, Blount, Chilton, Coosa, Saint Clair, Talladega, Tuscaloosa, Walker.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners with Credit Available Elsewhere	3.125
Homeowners without Credit Available Elsewhere	1.563
Businesses with Credit Available Elsewhere	5.710
Businesses without Credit Available Elsewhere	2.855
Non-Profit Organizations with Credit Available Elsewhere	2.000
Non-Profit Organizations without Credit Available Elsewhere	2.000
For Economic Injury:	
Businesses & Small Agricultural Cooperatives without Credit Available Elsewhere	2.855
Non-Profit Organizations without Credit Available Elsewhere	2.000

The number assigned to this disaster for physical damage is 17289 B and for economic injury is 17290 0.

(Catalog of Federal Domestic Assistance Number 59008)

Barbara Carson,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2021–28264 Filed 12–28–21; 8:45 am]

BILLING CODE 8026–03–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #17291 and #17292; Washington Disaster Number WA–00101]

Presidential Declaration of a Major Disaster for Public Assistance Only for the Confederated Tribes of the Colville Reservation Located in the State of Washington

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the Confederated Tribes of the Colville Reservation (FEMA—4631—DR), dated 12/21/2021.

Incident: Wildfires.

Incident Period: 07/12/2021 through 08/08/2021.

DATES: Issued on 12/21/2021.

Physical Loan Application Deadline Date: 02/21/2022.

Economic Injury (EIDL) Loan Application Deadline Date: 09/21/2022.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 12/21/2021, Private Non-Profit organizations that provide essential services of a governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Confederated Tribes of the Colville Reservation

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations with Credit Available Elsewhere	2.000
Non-Profit Organizations without Credit Available Elsewhere	2.000
For Economic Injury:	
Non-Profit Organizations without Credit Available Elsewhere	2.000

The number assigned to this disaster for physical damage is 17291 5 and for economic injury is 17292 0.

(Catalog of Federal Domestic Assistance Number 59008)

Barbara Carson,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2021–28265 Filed 12–28–21; 8:45 am]

BILLING CODE 8026–03–P

SMALL BUSINESS ADMINISTRATION

[License No. 03/03–0277]

NewSpring Mezzanine Capital IV, L.P.; Notice Seeking Exemption Under Section 312 of the Small Business Investment Act, Conflicts of Interest

Notice is hereby given that NewSpring Mezzanine Capital IV, L.P. located at 555 East Lancaster Avenue, 3rd Floor, Radnor, PA, 19087, a Federal Licensee under the Small Business Investment Act of 1958, as amended (''the Act''), in connection with a financing involving small concern Radius GMR, LLC located at 120 Fifth Avenue, New York, NY 10011, has sought an exemption under Section 312 of the Act and 13 CFR 107.730—Financings which constitute conflicts of interest.

This financing falls under 13 CFR 107.730(a)(4) because proceeds from the financing will be used discharge obligations owed to NewSpring Mezzanine Capital III L.P., an Associate of NewSpring Mezzanine Capital IV, L.P. Therefore, this transaction requires a prior written exemption from the U.S. Small Business Administration.

Notice is hereby given that any interested person may submit written comments on the transaction within fifteen days of the date of this publication to the Associate Administrator, Office of Investment and Innovation, U.S. Small Business Administration, 409 Third Street SW, Washington, DC 20416.

U.S. Small Business Administration.

Bailey DeVries,

Associate Administrator, Office of Investment and Innovation.

[FR Doc. 2021–28263 Filed 12–28–21; 8:45 am]

BILLING CODE 8026–03–P

SMALL BUSINESS ADMINISTRATION

[License No. 05/05–0293]

Convergent Capital Partners II, L.P.; Surrender of License of Small Business Investment Company

Pursuant to the authority granted to the United States Small Business Administration under the Small Business Investment Act of 1958, as amended, under Section 309 of the Act and Section 107.1900 of the Small Business Administration Rules and Regulations to function as a small business investment company under the Small Business Investment Company License No. 05/05–0293 issued to Convergent Capital Partners II, L.P., said license is hereby declared null and void.

United States Small Business Administration.

Bailey DeVries,

Associate Administrator, Office of Investment and Innovation.

[FR Doc. 2021–28261 Filed 12–28–21; 8:45 am]

BILLING CODE 8026–03–P

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments

ACTION: 60-Day notice and request for comments.

SUMMARY: The Small Business Administration (SBA) intends to request approval, from the Office of Management and Budget (OMB) for the collection of information described below. The Paperwork Reduction Act (PRA) requires federal agencies to publish a notice in the **Federal Register** concerning each proposed collection of information before submission to OMB, and to allow 60 days for public comment in response to the notice. This notice complies with that requirement.

DATES: Submit comments on or before February 28, 2022.

ADDRESSES: Email all comments to: Teresa Rodriguez, Office of Financial Program Operations, Small Business Administration, at *teresa.rodriguez@sba.gov.*

FOR FURTHER INFORMATION CONTACT: Adrienne Grierson, Deputy Director Office of Financial Program Operations, 202–205–6573, *adrienne.grierson@sba.gov* or or Curtis B. Rich, Management Analyst, 202–205–7030, *curtis.rich@sba.gov.*

SUPPLEMENTARY INFORMATION: SBA Form 1050, Settlement Sheet is used in SBA's 7(a) Loan Program to collect information from lenders and borrowers regarding the disbursement of loan proceeds. SBA relies on this information during the guaranty purchase review process as a component in determining whether to honor a loan guaranty. The current form includes 1050 Settlement Sheet instructions for the lender. The currently approved form primarily requires the lender and borrower to certify to whether they complied with a series of loan requirements. The current form also requires submission of documentation (*e.g.,* joint payee or cancelled checks, invoices or paid receipts, and wire transfer records) in support of the certification. SBA has determined that the section for ''Authorized Use of Proceeds'' does not include in the Settlement Sheet all the categories for'' Use of Proceeds'' this addition to the 1050 Settlement Sheet would enable the agency to effectively monitor compliance with loan disbursement procedures and will align with the ''Use of Proceeds'' categories for 7(a) loans. As a result, SBA is proposing to change both the content and format of the Form 1050.

The form will be divided into several sections to clearly identify the information to be submitted. The revised form will continue to collect the same basic identifying information such as loan amount, loan number and lender's name. In addition, the form will continue to require certifications from both the lender and borrower regarding compliance with the disbursement requirements and accuracy of information submitted. In the section for ''Authorized Use of Proceeds,'' the revised 1050 Settlement Sheet will include ''Land Acquisitions with or without improvements'', ''Leasehold Improvements to property owned by applicant or owned by others'', ''Export Working Capital (EWCP or Export Express)'', ''Support Standby Letter of Credit (EWCP or Export Express)'', Refinance Existing (EWCP) or Export LOC (EWCP)'', ''Business Acquisition/Change of Ownership'', ''Pay off SBA Loan, SID or Other Lender'', '' Pay Notes Payable, SID or Other Lender'', ''Pay Accounts Payable.'' These changes will allow the lender to document all the sources and uses of funds at the time of loan closing more clearly. This additional information will better allow both lenders and SBA staff to ensure that the necessary information is collected at the time of loan origination.

(a) Solicitation of Public Comments

SBA is requesting comments on (i) Whether the collection of information is necessary for the agency to properly perform its functions; (ii) whether the burden estimates are accurate; (iii) whether there are ways to minimize the burden, including using automated techniques or other forms of information technology; and (iv) whether there are ways to enhance the quality, utility, and clarity of the information.

(b) Summary of Information Collection

Title: Settlement Statement.

Form Numbers: SBA Form 1050.

OMB Control Number: 3245–0200.

Description of Respondents: SBA Lenders and Borrowers.

Estimated Number of Respondents: 27,000.

Frequency of Response per Respondent: 1.

Total Estimated Annual Responses: 27,000.

Total Estimated Annual Hour Burden: 30 minutes per respondent, for a total of 13,500 hours.

Curtis Rich,

Management Analyst.

[FR Doc. 2021–28260 Filed 12–28–21; 8:45 am]

BILLING CODE 8026–03–P

DEPARTMENT OF STATE

[Delegation of Authority No. 524]

Delegation of Authorities Under Section 102 of the Mutual Educational and Cultural Exchange Act of 1961, as Amended

By virtue of the authority vested in the Assistant Secretary of State for Educational and Cultural Affairs, including by Delegation of Authority No. 236–3 (August 28, 2000), and to the extent permitted by law, I hereby delegate to the Principal Deputy Assistant Secretary for Educational and Cultural Affairs the authorities and functions in section 102 of the Mutual Educational and Cultural Exchange Act of 1961 (22 U.S.C. 2452), relating to the provision by grant, contract or otherwise for educational and cultural exchanges.

Any authorities covered by this delegation may also be exercised by the Secretary, the Deputy Secretary, the Deputy Secretary for Management and Resources, the Under Secretary for Public Diplomacy and Public Affairs, and the Assistant Secretary for Educational and Cultural Affairs.

This Delegation of Authority does not revoke or otherwise affect any other delegation of authority currently in effect.

Any reference in this Delegation of Authority to any statute or delegation of authority shall be deemed to be a reference to such statute or delegation of authority as amended from time to time.

This Delegation shall be published in the **Federal Register**.

Lee A. Satterfield,

Assistant Secretary for Educational and Cultural Affairs, U.S. Department of State.

[FR Doc. 2021–28259 Filed 12–28–21; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Delegation of Authority No. 523]

Delegation of the Functions and Authorities Relating to Immunity From Judicial Seizure

By virtue of the authority vested in the Assistant Secretary of State for Educational and Cultural Affairs, including by Delegation of Authority No. 236–3 (August 28, 2000), and to the extent permitted by law, I hereby authorize the Principal Deputy Assistant Secretary for Educational and Cultural Affairs and the Deputy Assistant Secretary for Professional and Cultural Exchanges, as the designees of the Assistant Secretary, to exercise the functions and authorities in 22 U.S.C. 2459, concerning immunity from judicial seizure for cultural objects imported into the United States for temporary storage, conservation, scientific research, exhibition or display.

Any functions and authorities covered by this delegation may also be exercised by the Secretary, the Deputy Secretary, the Deputy Secretary for Management and Resources, the Under Secretary for Public Diplomacy and Public Affairs, and the Assistant Secretary for Educational and Cultural Affairs.

This Delegation of Authority does not revoke or otherwise affect any other delegation of authority currently in effect.

Any reference in this Delegation of Authority to any statute or delegation of authority shall be deemed to be a reference to such statute or delegation of authority as amended from time to time.

This Delegation shall be published in the **Federal Register**.

Lee A. Satterfield,

Assistant Secretary for Educational and Cultural Affairs, U.S. Department of State.

[FR Doc. 2021–28258 Filed 12–28–21; 8:45 am]

BILLING CODE 4710–05–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36377 (Sub-No. 4)]

BNSF Railway Company—Trackage Rights Exemption—Union Pacific Railroad Company

BNSF Railway Company (BNSF), a Class I rail carrier, has filed a verified notice of exemption under 49 CFR 1180.2(d)(7) for its acquisition of restricted, local, trackage rights over two rail lines owned by Union Pacific Railroad Company (UP) between: (1) UP mileposta 93.2 at Stockton, Cal., on UP's Oakland Subdivision, and UP milepost 219.4 at Elsey, Cal., on UP's Canyon Subdivision, a distance of 126.2 miles; and (2) UP milepost 219.4 at Elsey and UP milepost 280.7 at Keddie, Cal., on UP's Canyon Subdivision, a distance of 61.3 miles (collectively, the Lines).

Pursuant to a written temporary trackage rights agreement, UP has agreed to grant restricted trackage rights to BNSF over the Lines. The purpose of this transaction is to permit BNSF to move empty and loaded unit ballast trains to and from the ballast pit at Elsey, which is adjacent to the Lines. The agreement provides that the trackage rights are temporary in nature and are scheduled to expire on December 31, 2022.[1]

The transaction may be consummated on or after January 12, 2022, the effective date of the exemption (30 days after the verified notice was filed).

As a condition to this exemption, any employees affected by the acquisition of the trackage rights will be protected by the conditions imposed in *Norfolk & Western Railway—Trackage Rights—Burlington Northern, Inc.*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Railway—Lease & Operate—California Western Railroad*, 360 I.C.C. 653 (1980).

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than January 5, 2022 (at least seven days before the exemption becomes effective).

All pleadings, referring to Docket No. FD 36377 (Sub-No. 4), should be filed with the Surface Transportation Board via e-filing on the Board's website. In addition, a copy of each pleading must be served on BNSF's representative, Peter W. Denton, Steptoe & Johnson LLP, 1330 Connecticut Avenue NW, Washington, DC 20036.

According to BNSF, this action is categorically excluded from environmental review under 49 CFR 1105.6(c)(3) and from historic preservation reporting requirements under 49 CFR 1105.8(b)(3).

Board decisions and notices are available at *www.stb.gov*.

Decided: December 20, 2021.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

Stefan Rice,

Clearance Clerk.

[FR Doc. 2021–28286 Filed 12–28–21; 8:45 am]

BILLING CODE 4915–01–P

[1] BNSF states that, because the trackage rights are for local rather than overhead traffic, it has not filed under the Board's class exemption for temporary overhead trackage rights under 49 CFR 1180.2(d)(8). Instead, BNSF has filed under the trackage rights class exemption at section 1180.2(d)(7). BNSF concurrently filed a petition for partial revocation of this exemption, in Docket No. FD 36377 (Sub-No. 5), to permit these proposed trackage rights to expire at midnight on December 31, 2022, as provided in the agreement. The petition for partial revocation will be addressed in a subsequent decision.

SUSQUEHANNA RIVER BASIN COMMISSION

Projects Approved for Consumptive Uses of Water

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice.

SUMMARY: This notice lists the projects approved by rule by the Susquehanna River Basin Commission during the period set forth in **DATES**.

DATES: November 1–30, 2021.

ADDRESSES: Susquehanna River Basin Commission, 4423 North Front Street, Harrisburg, PA 17110–1788.

FOR FURTHER INFORMATION CONTACT: Jason E. Oyler, General Counsel and Secretary to the Commission, telephone: (717) 238–0423, ext. 1312; fax: (717) 238–2436; email: *joyler@srbc.net.* Regular mail inquiries May be sent to the above address.

SUPPLEMENTARY INFORMATION: This notice lists the projects, described below, receiving approval for the consumptive use of water pursuant to the Commission's approval by rule process set forth in 18 CFR 806.22 (e) and 18 CFR 806.22 (f) for the time period specified above:

Water Source Approval—Issued Under 18 CFR 806.22(f):

1. Seneca Resources Company, LLC; Pad ID: Schildt 259; ABR–20091027.R2; Jackson Township, Tioga County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: November 9, 2021.

2. Rockdale Marcellus, LLC; Pad ID: Heyler 748; ABR–201008031.R2; Morris Township, Tioga County, Pa.; Consumptive Use of Up to 4.9900 mgd; Approval Date: November 9, 2021.

3. Coterra Energy, Inc.; Pad ID: LippincoffF P1; ABR–201110014.R2; Brooklyn Township, Susquehanna County, Pa.; Consumptive Use of Up to 5.0000 mgd; Approval Date: November 9, 2021.

4. Coterra Energy, Inc.; Pad ID: ShieldsG P2; ABR–20091023.R2; Dimock Township, Susquehanna County, Pa.; Consumptive Use of Up to 5.0000 mgd; Approval Date: November 9, 2021.

5. Seneca Resources Company, LLC; Pad ID: Gamble Pad J; ABR–201511001.R1; Gamble Township, Lycoming County; Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: November 12, 2021.

6. Repsol Oil & Gas USA, LLC; Pad ID: Haralambous (03 074) G; ABR–201108037.R2; Columbia Township, Bradford County; Pa.; Consumptive Use of Up to 6.0000 mgd; Approval Date: November 12, 2021.

7. EQT ARO LLC; Pad ID: COP Tract 731 Pad C; ABR–201109016.R2; Cummings Township, Lycoming County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: November 12, 2021.

8. BKV Operating, LLC.; Pad ID: Henninger Pad; ABR–201110017.R2; Jessup Township, Susquehanna County, Pa.; Consumptive Use of Up to 5.0000 mgd; Approval Date: November 12, 2021.

9. Blackhill Energy LLC; Pad ID: PRUYNE 1H Pad; ABR–201110034.R2; Smithfield Township, Bradford County, Pa.; Consumptive Use of Up to 4.9900 mgd; Approval Date: November 12, 2021.

10. Blackhill Energy LLC; Pad ID: WOLFE Pad; ABR–201110033.R2; Smithfield Township, Bradford County, Pa.; Consumptive Use of Up to 4.9900 mgd; Approval Date: November 12, 2021.

11. Chesapeake Appalachia, L.L.C.; Pad ID: Bartholomew; ABR–201111012.R2; Franklin Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: November 15, 2021.

12. Chesapeake Appalachia, L.L.C.; Pad ID: Dulcey; ABR–201111020.R2; Franklin Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: November 15, 2021.

13. Repsol Oil & Gas USA, LLC; Pad ID: REINFRIED (02 113) C; ABR–201109004.R1; Ward Township, Tioga County, Pa.; Consumptive Use of Up to 6.0000 mgd; Approval Date: November 15, 2021.

14. Seneca Resources Company, LLC; Pad ID: Burleigh 508; ABR–20091019.R2; Rutland Township, Tioga County; Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: November 15, 2021.

15. Pennsylvania General Energy Company, L.L.C.; Pad ID: COP Tract 293 Pad I; ABR–201111014.R2; Cummings Township, Lycoming County; Pa.; Consumptive Use of Up to 3.5000 mgd; Approval Date: November 16, 2021.

16. Seneca Resources Company, LLC; Pad ID: Hungerford 458; ABR–20091019.R2; Lawrence Township, Clearfield County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: November 16, 2021.

17. Chief Oil & Gas, LLC; Pad ID: Beirne Green Hills Farms A Drilling Pad #1; ABR–201111024.R2; Asylum and Monroe Townships, Bradford County; Pa.; Consumptive Use of Up to 2.0000 mgd; Approval Date: November 19, 2021.

18. Diversified Production, LLC; Pad ID: Turkey; ABR–201107040.R2; Huston Township, Clearfield County; Pa.; Consumptive Use of Up to 1.0000 mgd; Approval Date: November 19, 2021.

19. Range Resources—Appalachia, LLC; Pad ID: Red Bend B Unit #1H—#8H; ABR–201111006.R2; Cogan House Township, Lycoming County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: November 22, 2021.

20. Range Resources—Appalachia, LLC; Pad ID: Red Bend C Unit #1H—#5H; ABR–201111007.R2; Cogan House Township, Lycoming County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: November 22, 2021.

21. Range Resources—Appalachia, LLC; Pad ID: Bobst Unit #34H—#37H; ABR–201111004.R2; Cogan House Township, Lycoming County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: November 22, 2021.

22. Seneca Resources Company, LLC; Pad ID: Starks 461; ABR–20091108.R2; Richmond Township, Tioga County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: November 23, 2021.

23. Seneca Resources Company, LLC; Pad ID: Yungwirth 307; ABR–20091110.R2; Charleston Township, Tioga County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: November 23, 2021.

24. Seneca Resources Company, LLC; Pad ID: Barrett 410; ABR–20091107.R2; Jackson Township, Tioga County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: November 23, 2021.

25. Seneca Resources Company, LLC; Pad ID: Button 402; ABR–20091113.R2; Jackson Township, Tioga County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: November 23, 2021.

26. Chesapeake Appalachia, L.L.C.; Pad ID: Gestewitz; ABR–201111002.R2; North Towanda Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: November 29, 2021.

27. Chesapeake Appalachia, L.L.C.; Pad ID: LW; ABR–201111027.R2; Cherry Township, Sullivan County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: November 29, 2021.

28, Chesapeake Appalachia, L.L.C.; Pad ID: Rossi; ABR–201111011.R2; Litchfield Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: November 29, 2021.

29. EQT ARO, LLC; Pad ID: David O Vollman Pad A; ABR–201011069.R2; Cogan House Township, Lycoming County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: November 29, 2021.

30. Range Resources—Appalachia, LLC;; Pad ID: Gulf USA 40H—42H;

ABR–201609001.R2; Snow Shoe Township, Centre County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: November 30, 2021.

31. Inflection Energy (PA), LLC; Pad ID: Ultimate Warrior; ABR–201111036.R2; Upper Fairfield Township, Lycoming County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: November 30, 2021.

32. Inflection Energy (PA), LLC; Pad ID: Stunner; ABR–201111037.R2; Gamble Township, Lycoming County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: November 30, 2021.

33. Inflection Energy (PA), LLC; Pad ID: Nature Boy; ABR–201111035.R2; Upper Fairfield Township, Lycoming County, Pa.; Consumptive Use of Up to 4.0000 mgd; Approval Date: November 30, 2021.

34. Coterra Energy, Inc.; Pad ID: HessR P1; ABR–201111034.R2; Dimock Township, Susquehanna County, Pa.; Consumptive Use of Up to 5.0000 mgd; Approval Date: November 30, 2021.

Dated: December 22, 2021.

Jason E. Oyler,

General Counsel and Secretary to the Commission.

[FR Doc. 2021–28228 Filed 12–28–21; 8:45 am]

BILLING CODE 7040–01–P

SUSQUEHANNA RIVER BASIN COMMISSION

Grandfathering (GF) Registration Notice

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice.

SUMMARY: This notice lists Grandfathering Registration for projects by the Susquehanna River Basin Commission during the period set forth in **DATES**.

DATES: November 1–30, 2021.

ADDRESSES: Susquehanna River Basin Commission, 4423 North Front Street, Harrisburg, PA 17110–1788.

FOR FURTHER INFORMATION CONTACT: Jason E. Oyler, General Counsel and Secretary to the Commission, telephone: (717) 238–0423, ext. 1312; fax: (717) 238–2436; email: *joyler@srbc.net.* Regular mail inquiries May be sent to the above address.

SUPPLEMENTARY INFORMATION: This notice lists GF Registration for projects, described below, pursuant to 18 CFR 806, subpart E for the time period specified above: *Grandfathering Registration Under 18 CFR part 806, subpart E:*

1. Roaring Spring Municipal Authority—Public Water Supply System, GF Certificate No. GF–202111192, Roaring Spring Borough, Blair County, Pa.; Roaring Spring; Issue Date: November 23, 2021.

2. Scotch Valley Country Club, Inc.—Scotch Valley Country Club, GF Certificate No. GF–202111193, Frankstown Township, Blair County, Pa.; consumptive use; Issue Date: November 23, 2021.

3. Pennsy Supply, Inc.—Mt. Holly Springs Quarry, GF Certificate No. GF–202111194, Dickinson Township, Cumberland County, Pa.; Well 1 (West Well) and Well 2 (East Well); Issue Date: November 30, 2021.

4. City of Binghamton—Public Water Supply System, GF Certificate No. GF–202111195, City of Binghamton, Broome County, N.Y.; Susquehanna River and Olmstead Well; Issue Date: November 30, 2021.

Dated: December 22, 2021.

Jason E. Oyler,

General Counsel and Secretary to the Commission.

[FR Doc. 2021–28226 Filed 12–28–21; 8:45 am]

BILLING CODE 7040–01–P

SUSQUEHANNA RIVER BASIN COMMISSION

Actions Taken at December 17, 2021 Meeting

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice.

SUMMARY: As part of its regular business meeting held on December 17, 2021, Harrisburg, Pennsylvania, the Commission approved the applications of certain water resources projects, and took additional actions, as set forth in the **SUPPLEMENTARY INFORMATION** below.

DATES: December 17, 2021.

ADDRESSES: Susquehanna River Basin Commission, 4423 N Front Street, Harrisburg, PA 17110–1788.

FOR FURTHER INFORMATION CONTACT: Jason E. Oyler, General Counsel and Secretary, telephone: (717) 238–0423, ext. 1312, fax: (717) 238–2436; email: *joyler@srbc.net.* Regular mail inquiries may be sent to the above address. See also Commission website at *www.srbc.net.*

SUPPLEMENTARY INFORMATION: In addition to the actions taken on projects identified in the summary above and the listings below, the following items were also acted upon at the business meeting: (1) Adoption of a policy, Fee Incentives for the Withdrawal and Consumptive Use of AMD Impacted Waters & Treated Wastewater; (2) adoption of the 2022 Regulatory Program Fee Schedule, including waiving inflationary increases to fees; (3) approval of two grant amendments and one grant agreement; (4) approval to enter into a Letter of Understanding regarding program coordination between SRBC and Pennsylvania Department of Environmental Protection.

Project Applications Approved

1. *Project Sponsor and Facility:* Chesapeake Appalachia, L.L.C. (Susquehanna River), Terry Township, Bradford County, Pa. Application for renewal and modification of surface water withdrawal of up to 3.000 mgd (peak day) (Docket No. 20170904).

2. *Project Sponsor and Facility:* Clearfield Municipal Authority, Pike Township, Clearfield County, Pa. Modification to extend the approval term of the groundwater withdrawal approval (Docket No. 19910704) to allow for project improvements.

3. *Project Sponsor:* Glenn O. Hawbaker, Inc. Project Facility: Naginey Facility, Armagh Township, Mifflin County, Pa. Applications for groundwater withdrawal of up to 0.300 mgd (30-day average) from the Quarry Pit Pond and consumptive use of up to 0.310 mgd (peak day).

4. *Project Sponsor:* Hydro Recovery-Antrim LP. Project Facility: Antrim Treatment Plant (Antrim No. 1 Mine Discharge and Backswitch Mine Discharge), Duncan Township, Tioga County, Pa. Applications for renewal of surface water withdrawal of up to 1.872 mgd (peak day) and for consumptive use of up to 1.872 mgd (30-day average) (Docket No. 20090902).

5. *Project Sponsor and Facility:* Mifflin County Municipal Authority (formerly The Municipal Authority of the Borough of Lewistown), Armagh Township, Mifflin County, Pa. Applications for groundwater withdrawals (30-day averages) of up to 0.770 mgd from McCoy Well 1, 1.152 mgd from McCoy Well 2, and 0.770 mgd from the Milroy Well.

6. *Project Sponsor:* Nature's Way Purewater Systems, Inc. Project Facility: USHydrations—Dupont Bottling Plant, Dupont Borough, Luzerne County, Pa. Modification to increase consumptive use (peak day) by an additional 0.100 mgd, for a total consumptive use of up to 0.449 mgd (Docket No. 20110618).

7. *Project Sponsor and Facility:* Shippensburg Borough Authority, Southampton Township, Cumberland County, Pa. Application for renewal of groundwater withdrawal of up to 2.000

mgd (30-day average) from Well 3 (Docket No. 20070305).

8. *Project Sponsor and Facility:* Walker Township Water Association, Inc., Walker Township, Centre County, Pa. Applications for renewal of groundwater withdrawals (30-day averages) of up to 0.432 mgd from Zion Well 2 and 0.320 mgd from Hecla Well 1 (Docket Nos. 19910302 and 19950906).

Commission-Initiated Project Approval Modifications

1. *Project Sponsor and Facility:* Elkview Country Club, Greenfield and Fell Townships, Lackawanna County, Pa. Conforming the grandfathering amount with the forthcoming determination for a surface water withdrawal up to 0.144 mgd (30-day average) from Crystal Lake (Docket No. 20021002).

Projects Tabled

1. *Project Sponsor and Facility:* Artesian Water Company, Inc., New Garden Township, Chester County, Pa. Application for renewal of the transfer of water of up to 3.000 mgd (30-day average) from the Chester Water Authority (Docket No. 19961105).

2. *Project Sponsor and Facility:* Chester Water Authority, New Garden Township, Chester County, Pa. Applications for renewal of consumptive use and for an out-of-basin diversion of up to 3.000 mgd (30-day average) (Docket No. 19961104).

3. *Project Sponsor and Facility:* Deep Woods Lake LLC, Dennison Township, Luzerne County, Pa. Applications for groundwater withdrawal of up to 0.200 mgd (30-day average) from Well SW–5 and consumptive use of up to 0.467 mgd (peak day).

4. *Project Sponsor and Facility:* Municipal Authority of the Township of East Hempfield dba Hempfield Water Authority, East Hempfield Township, Lancaster County, Pa. Applications for renewal of groundwater withdrawals (30 day averages) of up to 0.353 mgd from Well 6, 0.145 mgd from Well 7, 1.447 mgd from Well 8, and 1.800 mgd from Well 11, and Commission-initiated modification to Docket No. 20120906, which approves withdrawals from Wells 1, 2, 3, 4, and 5 and Spring S–1 (Docket Nos. 19870306, 19890503, 19930101, and 20120906).

5. *Project Sponsor:* Farmers Pride, Inc. Project Facility: Bell & Evans Plant 3, Bethel Township, Lebanon County, Pa. Applications for groundwater withdrawals (30-day averages) of up to 0.108 mgd from Well PW–1, 0.139 mgd from Well PW–2, and 0.179 mgd from Well PW–4.

Authority: Pub. L. 91–575, 84 Stat. 1509 *et seq.,* 18 CFR parts 806, 807, and 808.

Dated: December 22, 2021.

Jason E. Oyler,

General Counsel and Secretary to the Commission.

[FR Doc. 2021–28227 Filed 12–28–21; 8:45 am]

BILLING CODE 7040–01–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2006–25854; FMCSA–2010–0203; FMCSA–2013–0106; FMCSA–2013–0107; FMCSA–2013–0108; FMCSA–2015–0117; FMCSA–2015–0119; FMCSA–2017–0178; FMCSA–2017–0181; FMCSA–2017–0251; FMCSA–2018–0052]

Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew exemptions for 14 individuals from the requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) that interstate commercial motor vehicle (CMV) drivers have ''no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a CMV.'' The exemptions enable these individuals who have had one or more seizures and are taking anti-seizure medication to continue to operate CMVs in interstate commerce.

DATES: Each group of renewed exemptions were applicable on the dates stated in the discussions below and will expire on the dates stated in the discussions below. Comments must be received on or before January 28, 2022.

ADDRESSES: You may submit comments identified by the Federal Docket Management System (FDMS) Docket No. FMCSA–2006–25854, Docket No.FMCSA–2010–0203, Docket No. FMCSA–2013–0106, Docket No. FMCSA–2013–0107, Docket No. FMCSA–2013–0108, Docket No. FMCSA–2015–0117, Docket No. FMCSA–2015–0119, Docket No. FMCSA–2017–0178, Docket No. FMCSA–2017–0181, Docket No. FMCSA–2017–0251, or Docket No. FMCSA–2018–0052 using any of the following methods:

- *Federal eRulemaking Portal*: Go to *www.regulations.gov/*, insert the docket number, FMCSA–2006–25854, FMCSA–2010–0203, FMCSA–2013–0106, FMCSA–2013–0107, FMCSA–2013–0108, FMCSA–2015–0117, FMCSA–2015–0119, FMCSA–2017–0178, FMCSA–2017–0181, FMCSA–2017–0251, or FMCSA–2018–0052 in the keyword box and click ''Search.'' Next, sort the results by ''Posted (Newer-Older),'' choose the first notice listed, and click on the ''Comment'' button. Follow the online instructions for submitting comments.
- *Mail*: Dockets Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery*: West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE, Washington, DC 20590–0001 between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal Holidays.
- *Fax*: (202) 493–2251.

To avoid duplication, please use only one of these four methods. See the ''Public Participation'' portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov*, FMCSA, DOT, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Dockets Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Submitting CommentsIf you submit a comment, please include the docket number for this notice (Docket No. FMCSA–2006–25854, Docket No. FMCSA–2010–0203, Docket No. FMCSA–2013–0106, Docket No. FMCSA–2013–0107, Docket No. FMCSA–2013–0108, Docket No. FMCSA–2015–0117, Docket No. FMCSA–2015–0119, Docket No. FMCSA–2017–0178, Docket No. FMCSA–2017–0181, Docket No. FMCSA–2017–0251, or Docket No. FMCSA–2018–0052), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *www.regulations.gov/*, insert the docket number, FMCSA–2006–25854, FMCSA–2010–0203, FMCSA–2013–0106, FMCSA–2013–0107, FMCSA–2013–0108, FMCSA–2015–0117, FMCSA–2015–0119, FMCSA–2017–0178, FMCSA–2017–0181, FMCSA–2017–0251, or FMCSA–2018–0052 in the keyword box and click ''Search.'' Next, sort the results by ''Posted (Newer-Older),'' choose the first notice listed, click the ''Comment'' button, and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and material received during the comment period.

B. Viewing Comments

To view comments go to *www.regulations.gov*. Insert the docket number, FMCSA–2006–25854, FMCSA–2010–0203, FMCSA–2013–0106, FMCSA–2013–0107, FMCSA–2013–0108, FMCSA–2015–0117, FMCSA–2015–0119, FMCSA–2017–0178, FMCSA–2017–0181, FMCSA–2017–0251, or FMCSA–2018–0052 in the keyword box, and click ''Search.'' Next, sort the results by ''Posted (Newer-Older),'' choose the first notice listed, and click ''Browse Comments.'' If you do not have access to the internet, you may view the docket online by visiting Dockets Operations in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

C. Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its regulatory process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov*, as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.transportation.gov/privacy*.

II. Background

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statute also allows the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The physical qualification standard for drivers regarding epilepsy found in 49 CFR 391.41(b)(8) states that a person is physically qualified to drive a CMV if that person has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause the loss of consciousness or any loss of ability to control a CMV.

In addition to the regulations, FMCSA has published advisory criteria [1] to assist Medical Examiners in determining whether drivers with certain medical conditions are qualified to operate a CMV in interstate commerce.

[1] These criteria may be found in APPENDIX A TO PART 391—MEDICAL ADVISORY CRITERIA, section H. *Epilepsy*: § 391.41(b)(8), paragraphs 3, 4, and 5, which is available on the internet at *https://www.gpo.gov/fdsys/pkg/CFR-2015-title49-vol5/pdf/CFR-2015-title49-vol5-part391-appA.pdf.*

The 14 individuals listed in this notice have requested renewal of their exemptions from the epilepsy and seizure disorders prohibition in § 391.41(b)(8), in accordance with FMCSA procedures. Accordingly, FMCSA has evaluated these applications for renewal on their merits and decided to extend each exemption for a renewable 2-year period.

III. Request for Comments

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b), FMCSA will take immediate steps to revoke the exemption of a driver.

IV. Basis for Renewing Exemptions

In accordance with 49 U.S.C. 31136(e) and 31315(b), each of the 14 applicants has satisfied the renewal conditions for obtaining an exemption from the epilepsy and seizure disorders prohibition. The 14 drivers in this notice remain in good standing with the Agency, have maintained their medical monitoring and have not exhibited any medical issues that would compromise their ability to safely operate a CMV during the previous 2-year exemption period. In addition, for Commercial Driver's License (CDL) holders, the Commercial Driver's License Information System and the Motor Carrier Management Information System are searched for crash and violation data. For non-CDL holders, the Agency reviews the driving records from the State Driver's Licensing Agency. These factors provide an adequate basis for predicting each driver's ability to continue to safely operate a CMV in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of 2 years is likely to achieve a level of safety equal to that existing without the exemption.

In accordance with 49 U.S.C. 31136(e) and 31315(b), the following groups of drivers received renewed exemptions in the month of December and are discussed below.

As of December 16, 2021, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following 11 individuals have satisfied the renewal conditions for obtaining an exemption from the epilepsy and seizure disorders

prohibition in the FMCSRs for interstate CMV drivers:

Eric Barnwell (MI)
Christopher Bird (OH)
Gary Clark (KY)
Todd Davis (WI)
Scott DeJarnette (KY)
Gary J. Gress (PA)
Curtis Alan Hartman (MD)
Wendell F. Headley (MO)
Jason Kirkham (WI)
Dannie Kuck (MT)
Robert Spencer (FL)

The drivers were included in docket number FMCSA–2010–0203, FMCSA–2013–0106, FMCSA–2013–0107, FMCSA–2015–0117, FMCSA–2015–0119, FMCSA–2017–0178, FMCSA–2017–0181, FMCSA–2017–0251, or FMCSA–2018–0052. Their exemptions were applicable as of December 16, 2021 and will expire on December 16, 2023.

As of December 23, 2021, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following three individuals have satisfied the renewal conditions for obtaining an exemption from the epilepsy and seizure disorders prohibition in the FMCSRs for interstate CMV drivers:

Gary Freeman (WI); Aaron Gillette (SD); and David Kestner (VA)

The drivers were included in docket number FMCSA–2006–25854 and FMCSA–2013–0108. Their exemptions are applicable as of December 23, 2021 and will expire on December 23, 2023.

V. Conditions and Requirements

The exemptions are extended subject to the following conditions: (1) Each driver must remain seizure-free and maintain a stable treatment during the 2-year exemption period; (2) each driver must submit annual reports from their treating physicians attesting to the stability of treatment and that the driver has remained seizure-free; (3) each driver must undergo an annual medical examination by a certified ME, as defined by § 390.5; and (4) each driver must provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy of his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the exemption when driving, for presentation to a duly authorized Federal, State, or local enforcement official. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b).

VI. Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with this exemption with respect to a person operating under the exemption.

VII. Conclusion

Based on its evaluation of the 14 exemption applications, FMCSA renews the exemptions of the aforementioned drivers from the epilepsy and seizure disorders prohibition in § 391.41(b)(8). In accordance with 49 U.S.C. 31136(e) and 31315(b), each exemption will be valid for 2 years unless revoked earlier by FMCSA.

Larry W. Minor,
Associate Administrator for Policy.

[FR Doc. 2021–28307 Filed 12–28–21; 8:45 am]
BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2017–0058; FMCSA–2018–0136; FMCSA–2018–0138; FMCSA–2018–0139; FMCSA–2019–0109; FMCSA–2019–0110]

Qualification of Drivers; Exemption Applications; Hearing

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew exemptions for 23 individuals from the hearing requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) for interstate commercial motor vehicle (CMV) drivers. The exemptions enable these hard of hearing and deaf individuals to continue to operate CMVs in interstate commerce.

DATES: The exemptions are applicable on December 26, 2021. The exemptions expire on December 26, 2023. Comments must be received on or before January 28, 2022.

ADDRESSES: You may submit comments identified by the Federal Docket Management System (FDMS) Docket No. FMCSA–2017–0058, Docket No.

FMCSA–2018–0136, Docket No. FMCSA–2018–0138, Docket No. FMCSA–2018–0139, Docket No. FMCSA–2019–0109, or Docket No. FMCSA–2019–0110 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *www.regulations.gov/,* insert the docket number, FMCSA–2017–0058, FMCSA–2018–0136, FMCSA–2018–0138, FMCSA–2018–0139, FMCSA–2019–0109, or FMCSA–2019–0110 in the keyword box, and click ''Search.'' Next, sort the results by ''Posted (Newer-Older),'' choose the first notice listed, and click on the ''Comment'' button. Follow the online instructions for submitting comments.
- *Mail:* Dockets Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal Holidays.
- *Fax:* (202) 493–2251.

To avoid duplication, please use only one of these four methods. See the ''Public Participation'' portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, fmcsamedical@dot.gov, FMCSA, DOT, 1200 New Jersey Avenue, SE, Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Dockets Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA–2017–0058, Docket No. FMCSA–2018–0136, Docket No.

FMCSA–2018–0138, Docket No. FMCSA–2018–0139, Docket No. FMCSA–2019–0109, or Docket No. FMCSA–2019–0110), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to www.regulations.gov/, insert the docket number, FMCSA–2017–0058, FMCSA–2018–0136, FMCSA–2018–0138, FMCSA–2018–0139, FMCSA–2019–0109, or FMCSA–2019–0110 in the keyword box, and click ''Search.'' Next, sort the results by ''Posted (Newer-Older),'' choose the first notice listed, click the ''Comment'' button, and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and material received during the comment period.

B. Viewing Comments

To view comments go to *www.regulations.gov*. Insert the docket number, FMCSA–2017–0058, FMCSA–2018–0136, FMCSA–2018–0138, FMCSA–2018–0139, FMCSA–2019–0109, or FMCSA–2019–0110 in the keyword box, and click ''Search.'' Next, sort the results by ''Posted (Newer-Older),'' choose the first notice listed, and click ''Browse Comments.'' If you do not have access to the internet, you may view the docket online by visiting Dockets Operations in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

C. Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its regulatory process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov*, as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.transportation.gov/privacy*.

II. Background

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statute also allows the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The physical qualification standard for drivers regarding hearing found in 49aCFRa391.41(b)(11) states that a person is physically qualified to drive a CMV if that person first perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard (formerly ASA Standard) Z24.5–1951.

This standard was adopted in 1970 and was revised in 1971 to allow drivers to be qualified under this standard while wearing a hearing aid, 35 FR 6458, 6463(Apr. 22, 1970) and 36 FR 12857 (July 3, 1971).

The 23 individuals listed in this notice have requested renewal of their exemptions from the hearing standard in § 391.41(b)(11), in accordance with FMCSA procedures. Accordingly, FMCSA has evaluated these applications for renewal on their merits and decided to extend each exemption for a renewable 2-year period.

III. Request for Comments

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b), FMCSA will take immediate steps to revoke the exemption of a driver.

IV. Basis for Renewing Exemptions

In accordance with 49a U.S.C. 31136(e) and 31315(b), each of the 23 applicants has satisfied the renewal conditions for obtaining an exemption from the hearing requirement. The 23 drivers in this notice remain in good standing with the Agency. In addition, for Commercial Driver's License (CDL) holders, the Commercial Driver's License Information System and the Motor Carrier Management Information System are searched for crash and violation data. For non-CDL holders, the Agency reviews the driving records from the State Driver's Licensing Agency. These factors provide an adequate basis for predicting each driver's ability to continue to safely operate a CMV in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each of these drivers for a period of 2 years is likely to achieve a level of safety equal to that existing without the exemption.

As of December 26, 2021, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following 23 individuals have satisfied the renewal conditions for obtaining an exemption from the hearing requirement in the FMCSRs for interstate CMV drivers:

Mario Alvarado (CA)
Kasseth Andrews (MA)
Denis Ayers (MD)
Joseph Bence (OH)
Daryl A. Broker (MN)
Justin Brooks (WA)
Christa Butner (NC)
William Darnell (AZ)
Travis Davisson (IA)
Erik De Leon (TX)
Mitchell Estill (MO)
Paul Hoover (PA)
Amy Ivins (NE)
James Johnson (MN)
Keith Kenyon (WI)
Nicholas Kulasa (IL)
John Martikainen (CT)
John Silvers (NY)
Michael Swetnam (TX)
Mark Tabangcora (CA)
Yvon Victor (NJ)
Jeremy Williams (CA)
Joseph Williams (MD)

The drivers were included in docket number FMCSA–2017–0058, FMCSA–2018–0136, FMCSA–2018–0138, FMCSA–2018–0139, FMCSA–2019–0109, and FMCSA–2019–0110. Their exemptions are applicable as of December 26, 2021 and will expire on December 26, 2023.

V. Conditions and Requirements

The exemptions are extended subject to the following conditions: (1) Each driver must report any crashes or accidents as defined in § 390.5; and (2) report all citations and convictions for disqualifying offenses under 49 CFR 383 and 49 CFR 391 to FMCSA; and (3) each driver prohibited from operating a motorcoach or bus with passengers in interstate commerce. The driver must also have a copy of the exemption when driving, for presentation to a duly authorized Federal, State, or local enforcement official. In addition, the

exemption does not exempt the individual from meeting the applicable CDL testing requirements. Each exemption will be valid for 2 years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b).

VI. Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with this exemption with respect to a person operating under the exemption.

VII. Conclusion

Based upon its evaluation of the 23 exemption applications, FMCSA renews the exemptions of the aforementioned drivers from the hearing requirement in § 391.41(b)(11). In accordance with 49 U.S.C. 31136(e) and 31315(b), each exemption will be valid for two years unless revoked earlier by FMCSA.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2021–28308 Filed 12–28–21; 8:45 am]

BILLING CODE 4910–EX–P1019

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2001–11213, Notice No. 26]

Drug and Alcohol Testing: Determination of Minimum Random Testing Rates for 2022

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notification of determination.

SUMMARY: This notification of determination announces FRA's minimum annual random drug and minimum annual random alcohol testing rates for covered service and maintenance-of-way (MOW) employees for calendar year 2022.

DATES: This determination takes effect December 29, 2021.

FOR FURTHER INFORMATION CONTACT: Gerald Powers, FRA Drug and Alcohol Program Manager, by email: *gerald.powers@dot.gov* or by telephone: 202–493–6313; or Sam Noe, FRA Drug and Alcohol Program Specialist, by email: *sam.noe@dot.gov* or by telephone: 615–719–2951.

SUPPLEMENTARY INFORMATION: FRA is announcing the 2022 minimum annual random drug and alcohol testing rates for covered service and MOW employees. For calendar year 2022, the minimum annual random testing rates for covered service employees will continue to be 25 percent for drugs and 10 percent for alcohol, while the minimum annual random testing rates for MOW employees will be lowered to 25 percent for drugs and will continue to be 10 percent for alcohol. Because these rates represent minimums, railroads and railroad contractors may conduct FRA random testing at higher rates.

Discussion

To set its minimum annual random testing rates for each year, FRA examines the last two complete calendar years of railroad industry drug and alcohol program data submitted to its Management Information System (MIS). FRA has also, however, reserved the right to consider factors other than MIS-reported data before deciding whether to lower annual minimum random testing rates. See 85 FR 81265 (Dec. 15, 2020).

Random Testing Rates for Covered Service Employees

The rail industry's random drug testing positive rate for covered service employees (employees subject to the Federal hours of service laws and regulations) remained below 1.0 percent for 2019 and 2020. The Deputy Administrator has therefore determined the minimum annual random drug testing rate for covered service employees will remain at 25 percent for the period January 1, 2022, through December 31, 2022. The industry-wide random alcohol testing violation rate for covered service employees remained below 0.5 percent for 2019 and 2020. Therefore, the Deputy Administrator has determined the minimum random alcohol testing rate for covered service employees will remain at10 percent for the period January 1, 2022, through December 31, 2022.

Random Testing Rates for MOW Employees

MOW employees became subject to FRA random drug and alcohol testing in June 2017. *See* 81 FR 37894 (June 10, 2016). Although FRA had MIS data for two full, consecutive years of industry-wide performance rates for MOW employees when announcing the random testing rates for 2021, the Administrator found it was not in the interest of railroad safety to lower the random drug testing rate for MOW employees at that time. The Administrator did, however, lower the random alcohol testing rate for MOW employees to 10 percent. For an explanation of the Administrator's findings and determination, please refer to FRA's notification of determination for calendar year 2021. *See* 85 FR 81265–81267.

FRA now has MIS data for three full, consecutive years (2018–2020) for the industry-wide performance rates for MOW employees. The random drug testing violation rate for MOW employees has remained below 1.0 percent for the past two consecutive years, and has never been above 1.0 percent. The random drug testing violation rate for MOW employees also trended downwards in 2020, decreasing from 0.8 percent in 2019 to 0.59 percent in 2020, which is the lowest since FRA started collecting MIS data for MOW employees in 2017. Taking these factors into consideration, the Deputy Administrator has determined that the minimum annual drug testing rate for MOW employees will be lowered to 25 percent for the period January 1, 2022, through December 31, 2022. If the random drug testing violation rate for MOW employees increases to 1.0 percent or higher, FRA will raise the minimum annual drug testing rate back to 50 percent. *See* 49 CFR 219.625(d)(2).

Because the random alcohol testing violation rate for MOW employees remained below 0.5 percent for 2019 and 2020, the Deputy Administrator has determined that the minimum annual random alcohol testing rate for MOW employees will continue to be10 percent for the period January 1, 2022, through December 31, 2022.

Appendix

Appendix

Figure 1. Random Drug Testing Violation Rates for Covered Service and MOW Employees

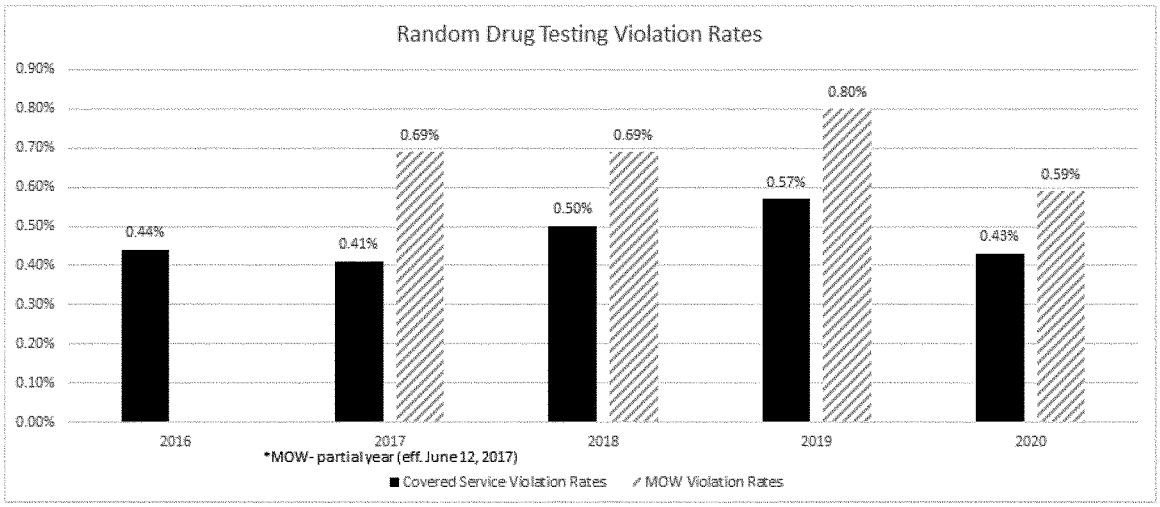
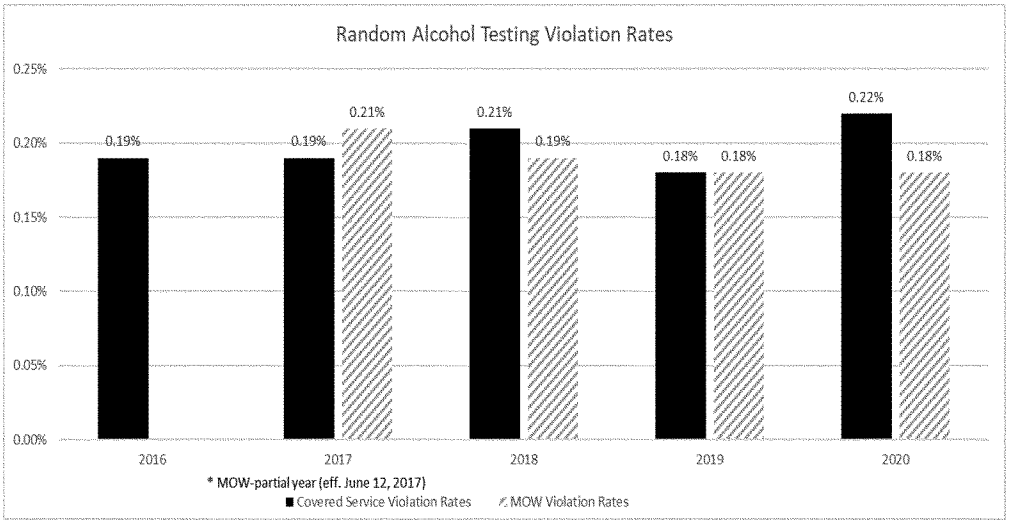


Figure 2. Random Alcohol Testing Violation Rates for Covered Service and MOW Employees



Issued in Washington, DC

Amitabha Bose,

Deputy Administrator.

[FR Doc. 2021–28325 Filed 12–28–21; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2021–0070]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Incident Reporting for Automated Driving Systems (ADS) and Level 2 Advanced Driver Assistance Systems (ADAS)

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Notice and request for comments on a request for extension of a currently approved information collection.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (PRA), this notice announces that the Information Collection Request (ICR) summarized below will be submitted to the Office of Management and Budget (OMB) for review and approval. This ICR describes NHTSA's information collection for incident reporting requirements for Automated Driving Systems (ADS) and Level 2 Advanced Driver Assistance Systems (ADAS) and its expected burden. NHTSA recently requested emergency review of its request for approval of this information collection and received a six-month approval. To start the normal clearance procedures and request OMB's approval for a three-year extension of this currently approved information collection, NHTSA published a **Federal Register** notice with a 60-day comment period soliciting comments on the information collection on September 30, 2021. NHTSA received 14 comments on the notice, as well as four letters regarding the information collection that were submitted directly to NHTSA.

DATES: Comments must be submitted on or before January 28, 2022.

ADDRESSES: Written comments and recommendations for the proposed information collection, including suggestions for reducing burden, should be submitted to the Office of Management and Budget at *www.reginfo.gov/public/do/PRAMain.* To find this particular information collection, select ''Currently under Review—Open for Public Comment'' or use the search function.

FOR FURTHER INFORMATION CONTACT: For additional information or access to background documents, contact Jeff Eyres, Office of Chief Counsel, telephone (202) 913–4307, or email at *jeffrey.eyres@dot.gov,* U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501 *et seq.*), a Federal agency must receive approval from the Office of Management and Budget (OMB) before it collects certain information from the public, and a person is not required to respond to a collection of information by a Federal agency unless the collection displays a valid OMB control number. In compliance with these requirements, this notice announces that the following information collection request will be submitted to OMB.

Title: Incident Reporting for Automated Driving Systems (ADS) and Level 2 Advanced Driver Assistance Systems (ADAS).

OMB Control Number: 2127–0754.

Form Number(s): Form 1612.

Type of Request: Approval of an extension with modification of a currently approved collection of information.

Type of Review Requested: Regular.

Requested Expiration Date of Approval: 3 years from date of approval.

Summary of the Collection of Information:

NHTSA requested and received emergency review and approval of this information collection. NHTSA submitted the request on June 29, 2021. On June 30, 2021, OMB granted NHTSA a six-month approval for this information collection and assigned the collection the OMB control number 2127–0754. NHTSA is publishing this document to seek an extension of this information collection.

NHTSA is seeking approval to extend its currently approved information collection requiring certain manufacturers of motor vehicles and equipment and operators of motor vehicles to submit incident reports for certain crashes involving Automated Driving Systems (ADS) and Level 2 Advanced Driver Assistance Systems (ADAS). These crash reporting obligations are set forth in NHTSA's Standing General Order 2021–01 (General Order) (as amended on August 5, 2021), which requires those manufacturers and operators named in and served with the General Order to report crashes that meet specified criteria to NHTSA.[1]

Specifically, the General Order requires the named manufacturers and operators (the reporting entities) to submit reports if they receive notice of certain crashes involving an ADS or Level 2 ADAS equipped vehicle that occur on publicly accessible roads in the United States. To be reportable, the vehicle, the ADS, or the Level 2 ADAS must have been manufactured by the reporting entity or the vehicle must have been operated by a reporting entity at the time of the crash, and the ADS or Level 2 ADAS must have been engaged at the time of or immediately before (≤30 seconds) the crash. In the event that a reporting entity receives notice of a reportable crash, the General Order requires the reporting entity to submit an incident report electronically to NHTSA. The required report includes basic information sufficient for NHTSA to identify those crashes that warrant follow-up. The reporting obligations are limited to those entities named in and served with the General Order. The General Order imposes no reporting obligations on any other companies and likewise imposes no reporting obligations on any individual consumers.

The agency has received incident reports for the past five months under its 6-month emergency clearance. Based on the agency's experience in reviewing these reports, and on the public comments received in response to the notice it published in the **Federal Register**, NHTSA has decided to amend the General Order. These changes, as well as a more detailed explanation of the information collection, is provided below in the section discussing the 60-day notice.

Description of the Need for the Information and Proposed Use of the Information

Under the National Traffic and Motor Vehicle Safety Act, as amended (the Safety Act), 49 U.S.C. Chapter 301, NHTSA is charged with authority ''to reduce traffic accidents and deaths and injuries resulting from traffic accidents.'' To carry out this statutory mandate, NHTSA has broad information gathering authority, including authority to obtain information on vehicle crashes, potential defects related to motor vehicle safety, and compliance with legal requirements to timely identify and conduct recalls for safety

[1] A copy of the General Order is available on NHTSA's website at *https://www.nhtsa.gov/laws-regulations/standing-general-order-crash-reporting-levels-driving-automation-2-5.*

defects. 49 U.S.C. 30166(e), (g), 30118–30120; 49 CFR Part 510.

NHTSA's statutory mandate includes the exercise of its authority to proactively ensure that motor vehicles and motor vehicle equipment, including those with novel technologies, perform in ways that protect the public against unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle, and against unreasonable risk of death or injury in an accident. 49 U.S.C. 30102. Both ADS and ADAS are ''motor vehicle equipment'' subject to the requirements of the Safety Act. Given the rapid evolution of these technologies and increasing testing of new technologies and features on publicly accessible roads, it is critical for NHTSA to exercise its oversight over potential safety defects in vehicles operating with ADS and Level 2 ADAS. The Safety Act is preventive, and the identification of safety defects does not and should not wait for injuries or deaths to occur.

ADS and Level 2 ADAS are new technologies that fundamentally alter the task of driving a motor vehicle. Crashes involving vehicles equipped with these technologies have resulted in multiple fatalities and serious injuries, and NHTSA anticipates that the number of these crashes will continue to grow in the near future given the increased number of these vehicles on the road and the increased number of vehicle and equipment manufacturers in the market. The General Order provides the agency with critical and timely crash data, which assists the agency in identifying potential safety issues resulting from the operation of advanced technologies on public roads. Access to this crash data may show whether there are common patterns in vehicle crashes or systematic problems with specific vehicles or systems, any of which may reflect a potential safety defect.

NHTSA intends to evaluate whether specific manufacturers (including manufacturers of prototype vehicles and equipment) are meeting their statutory obligations to ensure that their vehicles and equipment are free of defects that pose an unreasonable risk to motor vehicle safety, or are recalled if such a safety defect is identified. NHTSA's oversight of potential safety defects in vehicles operating on publicly accessible roads using ADS or Level 2 ADAS requires that NHTSA have timely information on incidents involving those vehicles. In carrying out the Safety Act, NHTSA may ''require, by general or special order, any person to file reports or answers to specific questions.'' 49 U.S.C. 30166(g)(1)(A).

60-Day Notice

A **Federal Register** notice with a 60-day comment period soliciting public comments on the following information collection was published on September 30, 2021 (86 FR 54287). The agency received fourteen comments from business, insurance, and industry associations, safety and consumer advocates, manufacturers and developers, and an interested individual. The agency also docketed four letters regarding the General Order that were received prior to publication of the 60-day notice.

NHTSA received comments that both supported NHTSA's intention to seek approval for a three-year approval from OMB and comments that were not supportive of the information collection or expressed concerns about the current requirements. In general, comments from safety and consumer advocate groups were more supportive and comments from the industry and industry groups expressed more criticism of the information collection. Specifically, NHTSA received comments regarding the definitions of ''notice'' and ''crash,'' the reporting requirements under Request No. 1, the reporting requirements under Request No. 2, the reporting requirements under Request No. 3, the reporting Requirements under Request No. 4, the Incident Report Form, the requirement that each reporting entity with notice of a reportable crash file a separate report, the burden placed by the General Order on ''vehicle suppliers,'' the requirements for submitting confidential business information (CBI), and the hourly burden estimates and associated labor cost estimates. A summary of the major comments and NHTSA's responses is provided below.

Comments on the Definition of ''Notice''

A reporting entity's duty to submit an incident report under the General Order is triggered by notice of facts meeting the criteria for different types of reports. It is the reporting entity's receipt of notice of these facts, and not the existence of a crash, that triggers the duty to report.

The General Order includes the following definition of the term ''Notice'':

> ''Notice'' is defined more broadly than in 49 CFR § 579.4 and means information you have received from any internal or external source and in any form (whether electronic, written, verbal, or otherwise) about an incident that occurred or is alleged to have occurred; including, but not limited to vehicle reports, test reports, crash reports, media reports, consumer or customer reports, claims, demands, and lawsuits. A manufacturer or operator has notice of a crash or a specified reporting criterion (*i.e.,* a resulting hospital-treated injury, fatality, vehicle tow-away, air bag deployment, or the involvement of a vulnerable road user) when it has notice of facts or alleged facts sufficient to meet the definition of a crash or a specified reporting criterion, regardless of whether the manufacturer has verified those facts.

The General Order's definition of notice is intentionally broad and provides that a reporting entity that receives information from any source and in any form, written or unwritten, verified or unverified, constitutes notice of the facts included in that information.[2]

Multiple commenters submitted comments stating that this definition is overly broad and creates an unnecessary burden on the reporting entities. The agency received comments on this issue from the U.S. Chamber of Commerce-Technology Engagement Center (''C_TEC''), the Consumer Technology Association (''CTA''), the Self-Driving Coalition for Safer Streets (''the Self-Driving Coalition''), the Alliance for Automotive Innovation (''Auto Innovators''), the Motor and Equipment Manufacturers Association (''MEMA''), and Aurora Operations, Inc. (''Aurora'').

Many of these comments focus on the fact that notice can come in the form of any information from any source. These commenters suggest that this definition should be narrowed to information intentionally directed to the reporting entity, information directed to a specified group of individuals, information in the form of a written claim or notice, or to exclude media reports.

The agency disagrees with these comments. The agency has found, through its own experience, that media reports are a valuable source of initial

[2] Although nothing in the General Order requires a reporting entity to affirmatively seek out facts about which it does not otherwise have notice, the agency expects that manufacturers and operators, as part of their ongoing defect identification and safety procedures, will investigate safety-related incidents with reasonable diligence. The agency likewise notes that a manufacturer is required to notify NHTSA if it ''learns the vehicle or equipment contains a defect and decides in good faith that the defect is related to motor vehicle safety.'' 49 U.S.C. § 30118(c)(1). The manufacturer must notify NHTSA after it ''first decides that a safety-related defect'' exists, 49 U.S.C. § 30119(c)(2), and must also submit a defect report under Part 573, ''not more than 5 working days after a defect in a vehicle or item of equipment has been determined to be safety related.'' 49 CFR § 573.6. The ''good faith'' requirement in Section 30118(c)(1) means that a manufacturer must notify NHTSA within five working days of when it actually identifies or, in the exercise of reasonable diligence, should have identified, a safety defect or noncompliance. *See United States* v. *Gen. Motors Corp.,* 656 F. Supp. 1555, 1559 n.5 (D.D.C. 1987), *aff'd on other grounds,* 841 F.2d 400 (D.C. Cir. 1988).

information regarding crashes of interest and does not believe that notice should come only in the form of written claims or notices. The agency understands that many of the reporting entities have processes already in place to review media stories regarding their vehicles and crashes regarding those vehicles. The agency also sees no reason to limit the term notice to written claims or notices directed to the reporting entity as information regarding reportable crashes can come from a variety of other sources. The agency therefore declines to limit this definition as suggested.

Other comments focused on the fact that the definition of notice includes any information received by the reporting entity and is not limited to specific individuals or employees within a specific department, employees of a certain seniority level, or employees with responsibilities relating to the review of and response to safety-related information. These comments suggest that the definition of notice should be limited to information received by those persons who normally receive information regarding crash reports and potential safety issues. Several comments include hypotheticals in which a production line employee or other employee with no specific responsibility for safety is told or reads about a crash (perhaps even while the employee is not working) that triggers a reporting requirement.

The agency disagrees with these comments, which appear to be largely based on theoretical hypotheticals rather than actual experience. As explained, the definition of notice is intentionally broad to ensure that the agency receives timely notice of all crashes that meet the reporting criteria. The list of reporting entities includes companies of different sizes and structures, which makes it difficult to identify a limited group of persons for purposes of this definition. The agency also notes that, despite the theoretical hypotheticals, none of the comments includes a real word example of actual situations that resulted in confusion or excessive burden. The agency is likewise unaware of any reports that have been submitted based on notice received in a manner similar to those suggested by these hypotheticals.

The agency need not, for the purposes of responding to these comments, engage in a legal analysis of whether information received, for example, by a production line worker, janitorial staff, or a marketing intern constitutes information received by the company. The agency expects that each reporting entity already has or will put into place internal reporting processes and implement training that reflect the size, nature, and business of that entity. Nonetheless, the agency also states that, if faced with a potential enforcement issue involving, as the hypotheticals suggest, an employee far removed from any responsibility for receiving, reporting, or analyzing potential safety-related information, the agency will consider any appropriate enforcement discretion warranted by the circumstances.

Other comments focus on that portion of the definition providing that a company has notice of facts when those facts are alleged, regardless of whether the reporting entity has verified those facts. These comments argue that including facts that have not yet been verified by the reporting entity substantially decreases the value of the reported information and increases the burden on the reporting entities.

The agency disagrees with these comments. The purpose of the General Order is to provide the agency with timely notice of crashes and circumstances that may reflect a safety-related defect with ADS or Level 2 ADAS equipped subject vehicles. The agency needs notice of these crashes and allegations before a reporting entity takes some indeterminate amount of time to investigate and try to verify the allegations, and the agency needs notice of these allegations regardless of whether they are disputed or have been verified by the reporting entities. The agency's own experience likewise counsels against limiting the scope of the reporting obligation to those facts that the reporting entity has verified or does not dispute. To the extent a reporting entity disputes the alleged facts, considers the alleged facts implausible, or even simply has not had time to investigate, it is able to provide that information and context in the narrative section of the incident report.

Other comments attempt to draw analogies with reporting requirements that apply to manufacturers under the agency's EWR (also referred to as TREAD) regulations. *See* 49 U.S.C. 30166; 49 CFR Part 579. These comments argue that the scope of the reporting obligations under the General Order should be narrowed to make them more similar in scope and burden to the reporting obligations under the EWR regulations. The agency disagrees with these comments and notes once again (as it did in its application for emergency authorization and in the 60-day notice) that one of the primary reasons the agency issued the General Order is that its existing information gathering regulations are different in scope (they apply only to manufacturers), in the information required to be submitted (they require no specific information about ADS or Level 2 ADAS), and in the timeliness with which the information is required to be submitted (which is frequently many months after an incident occurred).

Comments on Definition of ''Crash''

A reporting entity's reporting obligation under the General Order is limited to ''crashes'' that meet the specified criteria. The General Order includes the following definition of the term ''Crash'':

> ''Crash'' means any physical impact between a vehicle and another road user (vehicle, pedestrian, cyclist, etc.) or property that results or allegedly results in any property damage, injury, or fatality. For clarity, a subject vehicle is involved in a crash if it physically impacts another road user or if it contributes or is alleged to contribute (by steering, braking, acceleration, or other operational performance) to another vehicle's physical impact with another road user or property involved in that crash.

Under this definition, a crash occurs any time a motor vehicle impacts another road user or property and the impact results in property damage, injury, or fatality. Likewise, a subject vehicle is involved in a crash (which may trigger a reporting obligation), even if it is not involved in the resulting impact, if it nonetheless contributes or is alleged to contribute to the resulting impact.

MEMA, Aurora, Auto Innovators, the Self-Driving Coalition, and C_TEC each submitted comments stating that the definition of ''crash'' is overly-broad and creates unnecessary burden because it includes those impacts that result in ''any property damage.'' As the comments note, ''any property damage'' could include a slight paint scratch from a minor impact or other damage that might otherwise be considered *de minimus.* These comments state that requiring reporting entities to submit incident reports on these crashes provides the agency with no useful information while creating substantial burden on the reporting entities. These comments further suggest, as a proposed solution, that the definition of ''crash'' should be amended to include a threshold amount of damage such as $250 or $1,000 or limited to damage other than the subject vehicle itself.

The agency disagrees with these comments. The agency notes first that notice of an incident that meets the definition of a crash, by itself, does not trigger the obligation to submit an incident report. To be reportable, the crash must also meet the criteria

specified in Request No. 1 or Request No. 2.

To be reportable under Request No. 1, which applies to both Level 2 ADAS and ADS equipped vehicles, the crash must also involve, among other criteria, a fatality, a hospital treated injury, an air bag deployment, a vehicle tow-away, or a vulnerable road user (VRU). The agency is unaware of any crash involving one of these criteria that resulted in only a minor paint scratch or other *de minimus* damage and believes that any such crash is extremely unlikely to occur.

In contrast, under Request No. 2, which applies to ADS equipped vehicles, minor damage could result in a reporting obligation under Request No. 2, if the ADS system was engaged 30 seconds or less prior to the start of the crash. The concern expressed by these comments is therefore limited to a small subset of crashes involving ADS-equipped vehicles rather than the reporting obligations under the General Order as a whole.

At this time, there are no ADS equipped vehicles available for consumer purchase or use. Instead, these vehicles are typically operated as test vehicles or for limited commercial purposes such as taxi or delivery services under special use permits from State or local authorities and often under exemptions granted by and/or conditions imposed by the agency. As NHTSA noted in the General Order, ''ADS present new and unique risks to motor vehicle safety because they fundamentally alter the nature of motor vehicles and their operation.'' The General Order therefore requires that reporting entities submit incident reports for all crashes involving ADS equipped vehicles that meet the reporting criteria under Request No. 2, regardless of the extent or cost to repair any resulting damage. The agency believes that this reporting requirement is necessary and appropriate and that it does not create unnecessary or excessive burden for operators and manufacturers of ADS equipped vehicles and equipment.

The agency also disagrees that a reporting threshold based on the cost to repair any resulting property damage would have any material effect on the burden imposed on the reporting entities. To determine whether the cost to repair resulting damage exceeds a specific dollar value, the reporting entity would have to engage in an entirely different analysis that could involve repair estimates and differing cost structures depending on whether the repair was performed internally or by a third-party or whether parts were valued at wholesale or retail cost. A crash involving a vehicle owned by a large vehicle manufacturer with internal repair facilities might therefore not be reportable, while the same crash with the same damage might be reportable to a small developer that uses a third-party repair facility. Enforcement issues could likewise turn on whether the repair cost of the damage was $75.00 or $1,025.00 rather than the simpler question of whether there was any property damage. The agency therefore declines to amend the definition of crash to include a threshold amount of damage.[3]

Several comments also focus the clarifying statement in the definition stating that a vehicle is involved in a crash if it contributes or is alleged to contribute to the crash and argue that this statement makes the definition ambiguous with respect to when a vehicle is involved in a crash. The agency disagrees with these comments. The verb ''contribute,'' when used in its intransitive form (as it is in the definition of crash), has a commonly understood meaning—''to play a significant part in making something happen.''[4] A vehicle therefore is involved in a crash if it physically impacts another road user or if it plays or is alleged to play a significant part (by steering, braking, acceleration, or other operational performance) in causing another vehicle's physical impact with another road user or property involved in that crash. The agency does not believe this statement is ambiguous or otherwise in need of clarification.

Comments on Request No. 1

Under Request No. 1 of the General Order, a reporting entity must report any crash involving an ADS or Level 2 ADAS equipped vehicle that occurs on publicly accessible roads in the United States, where the ADS or Level 2 ADAS was engaged at any time during the period 30 seconds prior to the crash through the end of the crash, and the crash results in any individual being transported to a hospital for medical treatment, a fatality, a vehicle tow-away, or an air bag deployment or involves a vulnerable road user. Under these circumstances, the reporting entity must submit a report within one calendar day after the reporting entity receives notice of the crash, and an updated report is due 10 calendar days after receiving notice.

The 10-day report utilizes the same form and requests the same information as the one-day report. The 10-day report is a required follow up to the one-day report because it is anticipated that, for some (if not many) of these reportable crashes, the reporting entity will have minimal information one calendar day after it first receives notice. The General Order therefore requires both the one-day report, to give the agency prompt notice of a crash that may justify immediate follow up, and the 10-day report, to provide the agency with additional information regarding the crash about which the reporting entity may later receive notice. Reporting entities use the same incident report form for 1-day and 10-day crashes, and no different or incremental information is required for the 10-day report.

Multiple commenters, including C_TEC, Auto Innovators, CTA, Tesla, Inc. (''Tesla''), the Self-Driving Coalition, and MEMA, submitted comments stating that the requirement in Request No. 1 that an initial report be submitted within one calendar day is unnecessarily burdensome, provides no meaningful benefit to the agency, and increases the likelihood of inaccurate information being submitted to the agency. These comments focus on both the 1-day deadline for submitting the incident report, which requires reporting entities to report quickly following the receipt of notice, and the fact that the 1-day deadline is one calendar day rather than one business day, which requires reporting entities to monitor information and, if the criteria are met, to submit incident reports on weekends and holidays when the deadline falls on these days. These comments contend that the 1-day deadline creates unnecessary burden because a reporting entity has limited time to evaluate the notice it receives, determine whether a reporting obligation exists, and to prepare and submit an incident report if the crash is determined to be reportable. Because notice of a crash may come on a Friday afternoon or on a weekend and because the reports may need to be submitted on a weekend or holiday (or during a manufacturer's shut-down period), there is burden resulting from the need to have employees working or at least ''on-call'' to review information and file any required reports during these periods.

Many of these same comments suggest that the requirement of a 10-day updated incident report under Request No. 1 creates unnecessary burden and provides minimal information of value to the agency. These same comments

[3] For the avoidance of doubt, the agency also confirms that the property damage referenced in the definition of crash includes damage to the subject vehicle itself and declines to amend the definition of crash to exclude damage to the subject vehicle itself.

[4] *See https://www.merriam-webster.com/dictionary/contribute.*

suggest that this burden could be substantially reduced through a variety of different changes, including changing the deadlines from calendar days to business days, eliminating the 1-day report (*i.e.,* requiring only a 10-day report), combining the 1-day and 10-day reports into a single 5-day report, and permitting a reporting entity to designate an initial report as ''final'' to indicate that its investigation is complete.[5]

The agency understands the burden imposed by the 1-day and 10-day reporting requirements under Request No. 1. The agency also explained in its 60-day notice that the 1-day deadline is necessary to ensure that the agency has timely notice of those crashes reportable under Request No. 1 and the ability to timely respond to and investigate crashes reportable under Request No. 1. A later deadline could impede the agency's ability to respond or investigate, for example, by deploying a Special Crash Investigation (SCI) team to inspect the accident scene or vehicle, and a later deadline also could result in the loss of valuable information that is not properly preserved. The agency's experience since it issued the General Order has confirmed the importance of timely notice. The agency also has seen that prompt notice is most valuable for a subset of more serious crashes, specifically those for which the agency is most likely to send a team to investigate. In order to maintain timely notice with respect to these more serious incidents and, at the same time, reduce the resulting burden on respondents, NHTSA has decided to amend Request No. 1 of the General Order to create a new 5-day reporting category for some of these crashes.

Request No. 1 will be amended in a manner that keeps the 1-day and 10-day reporting sequence for any crash that involves a fatality, a hospital treated injury, or a vulnerable road user. For those crashes reportable under Request No. 1 that do not involve any of those criteria but involve an air bag deployment or a vehicle tow-away, the reporting requirement will be amended to a single incident report that must be submitted no later than 5 calendar days after the reporting entity receives notice. If the fifth calendar day falls on a weekend or holiday, the reporting entity may file this 5-day report early (*i.e.,* before the fifth calendar day) to avoid the burden of having to file such a report on a weekend or holiday. For the avoidance of confusion, the agency makes clear that this change will not take effect until the General Order is formally amended to reflect this change.

Based on its experience with 5 months of reporting since the General Order was issued, the agency estimates that only 8% of the reports required under Request No. 1 will involve a fatality, a hospital treated injury, or a vulnerable road user and therefore need to be submitted under the 1-day and 10-day sequence. The remaining reports, those not involving any of those three criteria but involving an air bag deployment or vehicle tow-away, which NHTSA estimates to be 92% of the reports required under Request No. 1, will require a single report within 5 calendar days of receiving notice. The burden estimates set forth below have been adjusted to reflect this forthcoming amendment to the General Order.

Aurora also submitted comments suggesting that Request No. 1 should be amended to reduce the starting point for the period during which the ADS or Level 2 ADAS system must have been engaged from 30 seconds prior to the initiation of a crash to 5 seconds prior to the initiation of a crash. The agency declines to amend Request No. 1 in this manner because it believes the proposed amendment could prevent the agency from receiving information relating to a potential safety defect and because the proposed amendment would not result in any meaningful reduction in burden.

Comments on Request No. 2

Under Request No. 2 of the General Order, a reporting entity must report any crash involving an ADS equipped vehicle that is not reportable under Request No. 1, but nonetheless occurs on a publicly accessible road in the United States while the ADS system was engaged at any time during the period 30 seconds prior to the crash through the conclusion of the crash. As a practical matter, therefore, the differences between Request No. 1 and Request No. 2 are that Request No. 2 is limited to ADS equipped vehicles (and does not include Level 2 ADAS equipped vehicles) and that crashes reportable under Request No. 2 do not involve a fatality, hospital treated injury, an air bag deployment, a vehicle tow-away, or a vulnerable road user. Upon receipt of notice of a crash reportable under Request No. 2, a reporting entity must submit a report regarding the crash on the fifteenth day of the month after the reporting entity receives notice.

CTA and the Self-Driving Coalition submitted comments suggesting that Request No. 2 should be eliminated from the General Order because the reported incidents, which do not involve any of the criteria included in Request 1.C, involve less serious crashes that are unlikely to include any meaningful data. These same commenters suggested that, if Request No. 2 is not removed from the General Order, it should be modified to include a minimum amount of crash damage as a reporting threshold.

NHTSA disagrees with these comments. For the same reasons discussed above with respect to comments regarding the definition of ''crash,'' the agency declines to amend Request No. 2.

The Self-Driving Coalition's comments also suggested that Request No. 2, which is limited to crashes involving subject vehicles equipped with ADS (and does not include subject vehicles equipped with Level 2 ADAS), places a disproportionate burden on ADS manufacturers and operators. The agency disagrees with these comments. Given the unique nature of ADS and the lack of ADS equipped vehicles for consumer use and purchase, the agency believes that the reporting requirements in Request No. 2 are appropriate and are not unduly burdensome.

Comments on Request No. 3

Request No. 3 requires reporting entities to submit a supplemental report on a previously reported incident the month after it receives notice of any material new or materially different information about the incident. This reporting obligation continues throughout the duration of the General Order.

Auto Innovators submitted comments stating that the reporting obligations under Request No. 3 are overly burdensome, especially due to the continuing nature of this obligation. These comments state that, pursuant to this obligation, reporting entities are required to separately review every incident for which a report was previously filed in each subsequent month to determine whether a supplemental report is due. For reports filed during the early months of the General Order, this obligation will continue throughout the three-year requested extension, and, with the passage of time, the number of prior incidents that need to be reviewed each

[5] Several comments noted that the deadline for reporting incidents in the agency's Standing General Order regarding Takata and ARC air bags is 5 business days. *See In re EA15–001 (Takata) Air Bag Inflator Rupture and PE15–027 (ARC) Air Bag Inflator Rupture,* Standing General Order 2015–01A Directed to Motor Vehicle Manufacturers (Aug. 17, 2015). The agency notes significant differences between the two general orders, including that the General Order 2015–01A required reporting entities to inquire with their foreign offices regarding air bag inflator ruptures that occurred outside the United States and to file reports regarding any such foreign incidents.

month will necessarily increase significantly.

The agency disagrees with these comments and believes they overstate the burden resulting from Request No. 3. The General Order does not require each reporting entity to review each prior report each month throughout the duration of the General Order. Instead, it requires a reporting entity that receives material new or materially different information regarding a crash for which it previously filed a report to file a supplemental report on the fifteenth day of the month after it receives notice of that information. The agency expects that, in the months immediately following the filing of an initial incident report, the reporting entity may need to carefully review whether it has received notice of information that triggers the obligation to submit a supplemental report under Request No. 3. With the passage of time, however, the agency believes that the burden resulting from Request No. 3 will diminish significantly. Nonetheless, the agency will continue to review reports submitted under Request No. 3 and evaluate the benefit of this information compared to the resulting burden. If the agency determines that this information is of little use and that an amendment is appropriate, it will have the benefit of the comments submitted and the solutions proposed.

Comments on Request No. 4

Request No. 4 of the General Order requires any reporting entity that has not submitted a monthly incident report under Request No. 2 or a monthly supplemental report under Request No. 3 to submit a report under Request No. 4 confirming that lack of reportable information under Requests Nos. 2 and 3.[6] To submit such a report, a reporting entity need only log onto the internet portal, select the appropriate type of report on the drop-down menu, and then fill in the month and year for which the report is submitted.[7]

The Association for Unmanned Vehicle Systems International (''AUVSI''), MEMA, and the Self-Driving Coalition submitted comments expressing the view that these reports, which contain no substantive crash information, are unnecessary, serve no useful function, and are therefore unnecessarily burdensome. The agency disagrees with these comments. The General Order is drafted in a manner to require that each reporting entity submit at least one monthly report (*i.e.,* a report under Request No. 2, Request No. 3, or Request No. 4.) per month.[8]

This requirement assists the agency in determining whether all the reporting entities are complying with their reporting requirements. Absent the reports required under Request No. 4, the agency would not know, for example, whether a reporting agency had nothing to report or was simply ignoring its reporting obligations. The agency also believes that, for some reporting entities, the obligation to file a monthly report in the absence of any reportable information under Request Nos. 2 and 3 provides an important reminder of the continuing obligation to report crashes that meet the specified criteria.

The burden associated with the reports required under Request No. 4 is minimal. A reporting entity should know, at the end of each calendar month, whether it is required to submit a report under Request No. 2 or Request No. 3. If a reporting entity has determined that is required to file such a report, there is no additional burden in determining that no report is required under Request No. 4. If the reporting entity has determined that it need not submit a report under Request No. 2 or Request No. 3, then the reporting entity need only fill in the month and the year for which the report is submitted under Request No. 4, which the agency estimates should not take more than 15 minutes per month. The agency therefore declines to amend the reporting requirements set forth in Request No. 4.

Comments Regarding the Incident Report Form

The General Order requires that reporting entities submit incident reports using a standard Incident Report Form, an image of which is attached to the General Order as Appendix C. Pursuant to an August 5, 2021 amendment to the General Order, the Incident Report Form was converted into an interactive web-based form, and all incident reports are now required to be submitted through a dedicated portal. Reporting entities use the same 1-page Incident Report Form for filing reports required to be submitted under Request Nos 1, 2, 3, and 4. To minimize the burden associated with this 1-page form, much of the information is entered through drop down menus, and the interactive form eliminates the need to submit information that is unnecessary or not applicable due to the nature of the report or a prior answer. A ''narrative'' section requires a free text description of the accident and also permits the reporting entity to enter any additional information it believes is important for context.

Several comments were submitted that suggested changes to the form. The agency likewise has made minor clarifying changes to the form, none of which is expected to impact the burden associated with completing the form.

The current version of the form includes a question about whether the subject vehicle was, at the time of the incident, operating within its operating design domain (ODD) and the highest level of automation (SAE Levels 2, 3, 4, or 5) with which the vehicle was equipped. To avoid any confusion, this question will be divided into three separate questions: (1) Whether the vehicle was operating within its ODD at the time of the crash; (2) whether the vehicle was equipped with ADS; and (3) whether the ADS was engaged at the time of or immediately prior to the crash. Each reporting entity will be required to answer each of these questions via a drop-down menu. Reporting entities will have the option of designating their response to the first question as confidential business information, but they will not be able to designate their response to the second or third questions as confidential business information.[9] The agency does

[6] Although the text of the General Order is clear, the agency notes, to avoid any confusion or misunderstanding, that a report under Request No. 4 is due in ''the absence of any new or updated Incident Reports due under Request No. 2 and Request No. 3.'' Request Nos. 2, 3, and 4 each involve monthly reports, and the General Order is structured to require at least one monthly report from each reporting entity each month. Request No. 1 is not a monthly report. Therefore, a reporting entity that files a 1-day and/or 10-day report under Request No. 1 during the prior month but not a monthly report under Request Nos. 2 or 3 is still required to file a monthly report under Request No. 4.

[7] The month and year included in the report should be the month and year for which the report is confirming the lack of reportable information under Request Nos. 2 and 3. A report filed on the fifteenth day of a month should therefore include the month and year for the prior month, which is the period for which the report is confirming the lack of reportable information. A reporting entity, when required to submit a report under Request No. 4, need only file a single report under Request No. 4 in any given month. It is not required to file a report under Request No. 4 for each previously reported crash.

[8] Because reports submitted under Request No. 1 are not monthly reports, a reporting entity that has submitted a report under Request No. 1 but not a monthly report under Request No. 2 or Request No. 3 is still required to submit a monthly report under Request No. 4.

[9] NHTSA has determined that the information required by the second and third questions does not include any potential CBI exempt from public disclosure under either the Safety Act (49 U.S.C. 30167(a)) or the Freedom of Information Act (5 U.S.C. 552(b)(4)). The nature of the vehicle information required by these questions (whether the vehicle was equipped with ADS and whether the ADS was engaged at the time of or immediately

not believe this change adds any burden associated with filling out the incident report form.

The Self-Driving Coalition submitted comments suggesting that the incident report form should be modified to change the question regarding ''Highest Injury Severity'' to ''Highest Injury Severity Alleged'' to reflect the unverified nature of this information. The agency agrees with this comment and intends to modify the form to incorporate this change.

AUVSI submitted comments suggesting that the incident report form should be amended to permit reporting entities to designate reportable crashes as preventable or not-preventable and that data from crashes designated as not-preventable should not be included in any aggregate data that is publicly released by the agency. The agency disagrees with this suggested change, which is contrary to the nature and purpose of the General Order.

Comments Regarding Crashes for Which Multiple Reporting Entities are Required To Submit Reports

The General Order requires each reporting entity with notice of a crash meeting the specified criteria to submit an incident report. Because the General Order includes vehicle manufacturers, vehicle operators, and ADS and Level 2 ADAS developers (equipment manufacturers), the agency expects that, for certain crashes, multiple entities may be required to submit incident reports. For example, both a third-party operator and an ADS developer are likely to have notice of a crash involving a vehicle from the developer's test fleet that is being operated by the operator. Likewise, in other circumstances, both an ADS developer and a vehicle manufacturer are likely to receive notice of a crash due to commercial relationships. The agency established these reporting requirements intentionally, both because there is value in collecting information from different entities with different perspectives relating to a crash and because, under some circumstances, one entity might receive notice of a crash before the other entity.

Multiple commenters, including the Self-Driving Coalition, MEMA, CTA, Auto Innovators, and C_TEC were submitted suggesting that these ''duplicate'' reports are unnecessary and unduly burdensome. These comments state that there is no incremental value to collecting the same information from multiple sources and that coordinating the filing of these reports among multiple entities is unnecessarily burdensome. These comments further state that this burden could be lessened by permitting multiple entities to designate a ''primary'' report filer or by permitting one entity to ''tag'' others in its report to eliminate the need for these other reporting entities to file separate reports.

The agency does not believe, as some of these comments assert, that the General Order's current reporting requirements are ''unnecessarily duplicative of information otherwise reasonably accessible to the agency.'' 5 CFR 1320.9(b). Instead, these reporting requirements reflect the reality that one reporting entity may have different information than another reporting entity or receive notice of that information at a different time than another reporting entity. The fact that some or even all this information may be the same for multiple entities with respect to a given crash does not make the reporting requirements unnecessarily duplicative.

The agency is concerned that any modification of these reporting requirements that allows one reporting entity to tag others or allows multiple reporting entities to designate a primary reporting entity would, for the reasons explained above, frustrate the objectives of these reporting requirements. Any such modification could also create significant enforcement issues if, for example, the agency learned that crash information about which one reporting entity had notice was not included in the incident report filed by another reporting entity that tagged the others or had been designated by others as primary.

The agency also believes that the burden concerns expressed in the comments on this issue are over-stated and that the proposed modifications would not materially reduce the resulting burden. If, as these comments suggest, multiple reporting entities are coordinating the review, analysis, and reporting of crash information about which they receive notice prior to filing their respective reports, all of this activity would still be necessary even if one of these reporting entities tagged others or was designated as primary by others. Under these circumstances, the only reduction in burden would be that the tagged or non-primary reporting entities would no longer have to complete the administrative task of filling out and submitting the 1-page incident report form. The current reporting structure is likewise appropriate for the reporting entities that are not coordinating their efforts to ensure the agency receives timely and complete information. Nonetheless, the agency will continue to review this issue and consider ways to reduce resulting burdens as appropriate. The agency has the benefit of these comments if it determines that any changes to the existing reporting requirements are appropriate.

Comments Regarding Unique Burdens for Vehicle Suppliers

The list of responsible parties included with the General Order includes several ''vehicle suppliers,'' companies that supply various components that are then integrated into completed vehicles, ADS, or Level 2 ADAS, by other vehicle or equipment manufacturers. Comments submitted by MEMA and Auto Innovators suggested that the General Order places unique and excessive burdens on these companies because, according to these comments, they are required to conduct an ongoing search for reportable crashes involving vehicles, ADS, or Level 2 ADAS that might involve a component or system they supplied and then investigate at length to determine whether they have a reporting obligation. These comments suggest that this alleged disproportionate burden on these vehicle suppliers can and should be reduced by limiting their reporting obligations to vehicles in their own test fleet, by amending the definition of ''vehicle equipment'' to eliminate any reference to software or components, and by clarifying the definition of ''Level 2 ADAS.''

The agency first notes that it did not include any of these companies in the General Order because they supply components that are incorporated into completed vehicles, ADS, or Level 2 ADAS. Instead, the agency included these companies in the General Order because the agency understands that each of them is already or shortly will be actively involved in the development of ADS and/or Level 2 ADAS, including testing that involves vehicles equipped with these systems being driven on publicly-accessible roads in the United States.[10]

The agency also disagrees with these comments, which appear to be based on

prior to the crash) is generally made public by commercial entities, law enforcement agencies, and NHTSA. NHTSA, therefore, will not keep this information confidential, intends to make it publicly available, and is providing no assurance to reporting entities to the contrary. *See Food Marketing Inst.* v. *Argus Leader Media,* 139 S. Ct. 2356, 2363 (2019).

[10] If the agency's understanding is not correct with respect to any specific reporting entity, it encourages that company to contact NHTSA (the General Order includes appropriate contact information) to discuss whether it should remain in the General Order.

a misunderstanding of the reporting requirements in the General Order and overstate the resulting burden. As previously noted, the reporting obligations under the General Order are triggered by notice of facts sufficient to meet each of the reporting criteria. For mass-produced consumer vehicles equipped with Level 2 ADAS (which appears to be the focus of these comments and the source of this alleged burden), a reporting entity has an obligation to report a crash only if it receives notice of information that satisfied each of the following criteria: (1) An ADS or Level 2 ADAS equipped vehicle for which it supplied components that were incorporated into the motor was involved in a crash; (2) the ADS or Level 2 ADAS was engaged during the period thirty seconds prior to and through the end of the crash; and (3) the crash involved a fatality, hospital treated injury, air bag deployment, vehicle tow-away, or vulnerable road user. The agency is unaware of any such report being filed by any vehicle supplier during the five months since the General Order was first issued.

There is no general or specific requirement that a reporting entity that is a manufacturer or supplier of brake pads, wiring harnesses, or lidar sensors actively search outside the company for potentially reportable crashes. Likewise, there is no requirement that any such reporting entity that learns of a crash involving a vehicle that includes a component it supplied actively investigate the crash to determine whether the other criteria have been met. Instead, a vehicle supplier (like every other reporting entity) that receives notice of information meeting each of the criteria must file a report. The agency expects that it would be extremely rare for any vehicle supplier to receive such notice unless it was significantly involved in developing, testing, or supplying an ADS or Level 2 ADAS, in which case the agency believes that the reporting requirement is appropriate.

The agency also notes that Level 2 ADAS (and perhaps, in the future, ADS) currently enter the consumer market in different forms, including after-market software and hardware components, which are then integrated with other existing vehicle components. Changing the definition of motor vehicle equipment as the comments suggests would, contrary to the agency's intent, eliminate these after-market systems from the scope of the General Order. For all these reasons, the agency therefore declines to modify the reporting requirements as suggested by these comments.

Comments on Confidential Business Information Designations

Under the terms of the General Order, a reporting entity that claims information it is submitting to the agency in an incident report form constitutes confidential business information is required to follow the agency's standard procedures for making such a claim. *See* 49 CFR Part 512. The Self-Driving Coalition and Auto Innovators submitted comments suggesting that the burden associated with making a separate submission for each incident report is excessive. These comments suggest that the agency either make a ''class determination'' that certain information is protected CBI or permit aggregated CBI submissions on a weekly or monthly basis to lessen this burden. These comments also suggest that the burden associated with CBI designations could be lessened if a reporting entity was able to file its CBI designations via the same portal established for filing incident report forms under the General Order.

The procedures for filing CBI designations are established by the agency's regulations rather than the General Order. *See* 49 CFR Part 512. Although these regulations include various ''class determinations'' (*see, e.g.,* 49 CFR 512 Appendix C), the agency does not believe such a determination is appropriate with respect to information required to be submitted under the General Order. The five months of reporting history demonstrates that there is no consensus approach to whether reporting entities request CBI treatment for this information.

With respect to the comments regarding aggregated CBI requests or utilizing the portal to submit CBI requests, the agency is continually reviewing various procedures under the General Order to determine whether the resulting burden can be reduced. The agency will have the benefit of these comments as it considers whether any such changes are appropriate with respect to CBI requests.

Other Comments

Multiple commenters submitted comments stating that the agency should expand the General Order to also require reporting of incidents other than the specified crashes (*e.g.,* traffic violations), suggesting different development approaches (*e.g.,* the use of DoD/aerospace simulation and modeling technology) for advanced driving technologies, or offering ''guiding principles'' for the development and/or regulation of advanced driving technologies. The agency also received numerous comments expressing concern or offering suggestions regarding the way information submitted by reporting entities under the General Order will be made public and whether appropriate context will be provided with that information. The agency appreciates these comments and has reviewed them with interest, but it declines to address them in the context of this request for an extension of the existing approval of this information collection because they are not burden related.

Agency Estimates Regarding the Annual Number of Reports

In the 60-day Notice, NHTSA made various estimates regarding the number of incidents about which the reporting entities would be required to submit reports on an annual basis. Although those estimates were made based on the best information available to the agency at the time, the agency now has over five months of reporting data and history and is therefore able to substantially refine those estimates.

Level 2 ADAS 1-Day Incident Reports Under Request No. 1

In its 60-day Notice, NHTSA estimated that ''it will receive responses from 20 respondents reporting Level 2 ADAS crashes each year,'' ''that each respondent will submit, on average, 170 incident reports per year,'' and that it ''will receive, on average 3,400 Level 2 ADAS incident reports each year.'' The agency explained that this was ''a high-end estimate'' that would later be refined.

Although the agency received no comments directly addressing the estimate of 3,400 incident reports per year, several commenters used this estimate (without providing any alternative estimate) in support of arguments that the burden associated with these reports is excessive. With the benefit of actual reporting history and data, the agency is now able to substantially revise this estimate to 1,000 reports per year under Request No. 1 for Level 2 ADAS incidents.

As explained in more detail above, the agency also has decided to amend the reporting requirements in Request No. 1 to require that a report be filed within 1 calendar day only with respect to those crashes involving a fatality, a hospital-treated injury, or a vulnerable road user. Based on data of reported incidents through December 1, 2021, the agency estimates that only 8% of the reports required under Request No. 1 will meet one of these criteria. Accordingly, NHTSA now estimates it will receive 80 1-day Level 2 ADAS

incident reports per year. Reporting entities will be required to submit the remainder of the reports (estimated to be 92% of the total) within 5 calendar days after notice of the crash.

Level 2 ADAS 5-Day Incident Reports Under Request No. 1

As discussed above, NHTSA is now allowing some of the reports that were previously required to be submitted within one calendar day to instead be submitted within 5 calendar days. The agency estimates that 92% of all Level 2 ADAS crashes will be submitted in 5-day incident reports. Accordingly, the agency now estimates that of the 1,000 Level 2 ADAS incident reports submitted each year, approximately 920 will be 5-day Level 2 ADAS incident reports.

Level 2 ADAS 10-Day Incident Reports Under Request No. 1

Under the current terms of the General Order, a reporting entity submitting an initial report within 1 calendar day under Request No. 1 is also required to submit an updated report on the tenth calendar day after notice of the crash. In its 60-day Notice, NHTSA therefore estimated the number of 10-day updated reports to be equal to the number of 1-day reports. As explained above, the agency has decided to amend Request No. 1 of the General Order to limit the 1-day and 10-day reporting sequence to crashes involving a fatality, a hospital treated injury, or a vulnerable road user. The agency estimates that 8% of the reports required under Request No. 1 will meet one of these criteria. No 10-day updated report therefore will be required for the remaining reports required under Request No. 1, an estimated 92% of those reports.

Based on its revised volume estimates and the forthcoming amendment to Request No. 1, the agency revises its estimate of the number of 10-day reports to 80 reports each year.

ADS 1-Day Incident Reports Under Request No. 1

In its 60-day Notice, NHTSA estimated that it would receive 200 incident reports per year involving ADS equipped vehicles. The agency further estimated that half of these reports (100) would be filed pursuant to the 1-day and 10-day sequence under Request No. 1 and that the remaining half of these ADS incident reports (100) would be submitted under Request No. 2 as monthly incident reports. With the benefit of five months of reporting experience and data, the agency is able to refine these estimates. NHTSA estimates that it will receive 150 ADS incident reports annually under Request No. 1. However, as a result of the amendment discussed above, not all of those reports will be required to be submitted within one calendar day. Based on the discussed criteria and the incident reports the agency has received thus far, NHTSA estimates that 20% of the reports will be required to be submitted within one calendar day. Accordingly, the agency now estimates that it will receive 30 1-day reports each year. Reporting entities would be required to submit the remainder of the reports within five calendar days of receiving notice.

ADS 5-Day Reports Under Request No. 1

As discussed above, NHTSA estimates that it will receive 150 ADS crash reports under Request No. 1 each year and that 20% of the reports will need to be submitted within one day and 80% will be required to be submitted within five calendar days. Accordingly, the agency estimates that it will receive 120 5-day ADS incident reports each year.

ADS 10-Day Update Reports Under Request No. 1

In its 60-day Notice, NHTSA estimated that the annual volume of 10-day updated ADS reports would be the same as the volume of 1-day ADS Reports because the General Order requires a 10-day updated report for each 1-day report. Based on the revised estimates and amendment discussed above, the agency revises its estimate of annual 10-day reports to 30 (the same number as the estimated annual 1-day ADS incident reports described above).

ADS Monthly Incident Reports Under Request No. 2

In its 60-day Notice, NHTSA estimated that it would receive 100 ADS monthly incident reports per year under Request No. 2. Based on the revised estimates described above, the agency revises this estimate to 200 ADS monthly incident reports per year.

Monthly Supplemental Incident Reports Under Request No. 3

A reporting entity is required to file a monthly supplemental report under Request No. 3 only if it receives notice of new material or materially different information regarding a crash for which a report was previously submitted under Request Nos. 1 or 2. In its 60-day Notice, NHTSA estimated that it would receive 25 ADS and 170 Level 2 ADAS monthly supplemental reports per year. With the benefit of 5 months of reporting experience, the agency revises this estimate to 40 ADS and 75 Level 2 ADAS supplemental reports each month.

Monthly Reports Under Request No. 4

In the absence of any new or supplemental reports due under Request No. 2 and Request No. 3, each reporting entity is required to submit an Incident Report confirming the lack of any reportable information under those requests on the fifteenth (15th) calendar day of each month. In its 60-day Notice, NHTSA estimated that 80% of the reporting entities each month will submit a report under Request No. 4. Based on an average of 110 total reporting entities per year, the agency estimates that it will receive 1,056 reports annually under Request No. 4.

The total burden and cost estimates set forth below have been revised consistent with these revised annual volume estimates.

Hourly Burden Estimates

NHTSA received three comments, from Auto Innovators, MEMA, and the Self-Driving Coalition, stating that the agency underestimated the burden hours associated with the different reporting requirements. These comments and the agency's responses to these comments are discussed in more detail in the section below explaining NHTSA's burden calculations.

Labor Cost Estimates

In its 60-day Notice, NHTSA explained that it had estimated the total labor costs associated with burden hours by looking at the average wage for architectural and engineering managers in the motor vehicle manufacturing industry (Standard Occupational Classification # 11–9041). The Bureau of Labor Statistics (BLS) estimates that the average hourly wage for this occupational classification is $65.62 and estimates that private industry workers'' wages represent 70.4% of total labor compensation costs. Therefore, the agency estimated the hourly labor costs to be $93.21.

Auto Innovators submitted comments stating that the agency, as part of its burden analysis, had underestimated the hourly cost of the labor required to meet the reporting obligations in the order. This same commenter suggested that, given the managerial and legal review and oversight involved in this information collection, a more realistic hourly labor cost is $120.00. In response to this comment, NHTSA is revising its estimate of the labor costs associated with burden hours, as discussed in the section discussing NHTSA's burden estimates.

Affected Public: Vehicle and equipment manufacturers and operators of ADS or Level 2 ADAS equipped vehicles.

Estimated Number of Respondents: 110.

Frequency: Monthly and on occasion.

Number of Responses: 2,631.

Estimated Total Annual Burden Hours: 31,319 hours.

As discussed above, NHTSA is making changes to the General Order that will affect the total burden hours. The agency also has acquired new information that allows the agency to estimate burdens more accurately. To estimate the burden associated with this information collection, the agency separated the requirements of the General Order into thirteen components: (1) Incident reports under Request No. 1 involving Level 2 ADAS that must be submitted within one calendar day; (2) updates under Request No. 1 to 1-day incident reports involving Level 2 ADAS that must be submitted within ten calendar days; (3) incident reports under Request No. 1 involving Level 2 ADAS that must be submitted within five calendar days; (4) incident reports under Request No. 1 involving ADS that must be submitted within one calendar day; (5) updates under Request No. 1 to incident 1-day reports involving ADS that must be submitted within ten calendar days; (6) incident reports under Request No. 1 involving ADS that must be submitted within five calendar days; (7) monthly incident reports under Request No. 2 involving ADS that must be submitted on the fifteenth of the following month; (8) monthly supplemental reports under Request No. 3 involving Level 2 ADAS incidents that must be submitted on the fifteenth of the following month; (9) monthly supplemental reports under Request No. 3 involving ADS that must be submitted on the fifteenth of the following month; (10) monthly reports under Request No. 4 confirming the lack of reportable information under Requests No. 2 and No. 3, (11) additional time for screening incoming information; (12) training employees on the requirements; and (13) time to set up an account to submit the reports. The burden associated with categories (12) and (13) are one-time start-up burdens that will be incurred during the proposed extension only to the extent that new reporting entities are added to the General Order during this period. For the 108 reporting entities currently named in the General Order, this burden has already been and was accounted for under the currently approved information collection request.

The estimated number of respondents consists of the number of reporting entities.

NHTSA estimates that there will be an average of 110 reporting entities during each year of the proposed extension. Currently, there are 108 reporting entities named in the General Order. The agency believes that additional reporting entities will be added to the General Order during the proposed extension as new companies enter the market and begin developing and manufacturing ADS and ADAS technology and vehicles equipped with these technologies. The agency also believes that some existing reporting entities will be removed from the General Order due to the cessation of operations or market consolidation.

Burden Category 1: ADAS 1–Day Reports under Request No. 1.

To estimate the burden associated with submitting Level 2 ADAS crash reports, NHTSA first looked to the category of crashes that must be reported. As explained above, the agency has decided to amend the General Order to only require reporting of Level 2 ADAS crashes within one business day when (1) the crash occurred on a publicly accessible road in the United States (including any of its territories); (2) the Level 2 ADAS was engaged at any time during the period from 30 seconds immediately prior to the commencement of the crash through the conclusion of the crash; and (3) the crash resulted in a fatality, a hospital treated injury, or involved a vulnerable road user. Incidents meeting the first two criteria and also involving a vehicle tow-away or an air bag deployment, but not involving a fatality, hospital treated injury, or vulnerable road user will be required to be reported within five calendar days.

As discussed above and based on five months of incident reporting under the existing clearance, NHTSA estimates that it will receive approximately 80 1-day Level 2 ADAS incident reports each year. Based on the number of manufacturers that manufacture vehicles equipped with Level 2 ADAS systems, the agency estimates that it will receive responses from 20 respondents reporting Level 2 ADAS crashes each year.

In the 60-day Notice, NHTSA estimated that it would take respondents approximately 2 hours to compile and submit each crash report. The agency received comments from Auto Innovators, MEMA, and the Self-Driving Coalition stating that NHTSA had underestimated the burden hours for the reporting requirements. Specifically, Auto Innovators stated that a more accurate estimate would be 8 hours for each 1-day incident report. The Self-Driving Coalition also provided estimates of the burden hours for 1-day reports (between 5 and 12 hours), but since the estimates were provided for ADS 1-day reports, NHTSA is using the estimate provided by Auto Innovators. NHTSA now estimates that 1-day reports takes, on average, 8 hours. Therefore, the agency estimates the total annual burden hours for submitting Level 2 ADAS 1-day crash reports to be 640 hours (8 hours × 80 crash reports) for all manufactures. Therefore, the average burden for the estimated 20 manufacturers submitting 1-day ADAS incident reports is estimated to be 32 hours.

Burden Category 2: ADAS 10-Day Reports Under Request No. 1.

As discussed above, in addition to submitting information on certain Level 2 ADAS crashes within one day, reporting entities must also submit updated information within ten days. NHTSA has decided to only require 10-day update reports for incidents required to be reported within one calendar day. In the 60-day notice, NHTSA estimated that providing updated crash reports would take approximately 1 hour per report. However, both Auto Innovators and the Self-Driving Coalition submitted comments stating that NHTSA underestimated the burden for submitting the reports. Auto Innovators stated that a reasonable mid-point in the burden estimates from members would be 20 hours to submit these updates and the Self-Driving Coalition stated that it would take between 3 and 24 hours, depending on the complexity of the incident. Since the Self-Driving Coalition's comments were specific to ADS reporting, NHTSA is revising its estimate based on the Auto Innovators'' comment and now estimating that providing an updated 10-day report will take 20 hours. Therefore, the agency estimates that the total burden for submitting 10-day update reports for Level 2 ADAS incidents will take 1,600 hours (20 hours × 80 reports), for an average of 80 hours for each of the 20 reporting entities expected to submit reports each year.

Burden Category 3: ADAS 5-Day Reports Under Request No. 1.

To estimate the burden associated with submitting Level 2 ADAS 5-day crash reports, NHTSA first looked to the category of crashes that must be reported. As explained above, the agency has decided to amend the General Order to require 5-day reporting of Level 2 ADAS crashes when (1) the crash occurred on a publicly accessible

road in the United States (including any of its territories); (2) the Level 2 ADAS was engaged at any time during the period from 30 seconds immediately prior to the commencement of the crash through the conclusion of the crash; and (3) and the crash involves a vehicle tow-away or an air bag deployment, but not a fatality, hospital treated injury, or vulnerable road user. As discussed above and based on five months of incident reporting under the existing clearance, the agency estimates that it will receive approximately 920 5-day Level 2 ADAS incident reports each year. Based on the number of reporting entities that manufacture Level 2 ADAS or vehicles equipped with Level 2 ADAS systems, the agency estimates that it will receive responses from 20 respondents reporting Level 2 ADAS crashes each year.

In the 60-day notice, NHTSA estimated that it would take respondents approximately 2 hours to compile and submit each 1-day crash report. The agency received comments from Auto Innovators, MEMA, and the Self-Driving Coalition stating that NHTSA had underestimated the burden hours for the reporting requirements. Specifically, Auto Innovators stated that the average submission would take 8 hours for each 1-day incident report. The Self-Driving Coalition also provided estimates of the burden for 1-day incident reports (between 5 and 12 hours) for ADS 1-day reports. NHTSA also received comments from Auto Innovators and the Self-Driving Coalition that stated that updated reports may take longer to submit than initial reports.

Because reporting entities will not be required to submit 10-day update reports for incidents required to be submitted to NHTSA within five business days, and because after five days more information may be available for review, the agency is basing its estimate of burden for 5-day reports off the burden estimates provided by commenters for the 10-day update report. Auto Innovators stated that a reasonable mid-point in the burden estimates from members would be 20 hours to submit updates and the Self-Driving Coalition stated that it would take between 3 and 24 hours, depending on the complexity of the incident. Because the Self-Driving Coalition's comments regarding burden were specifically for ADS crash reporting, NHTSA believes it is appropriate to use different burden estimates for Level 2 ADAS reporting and ADS reporting. Based on the comments, it appears that larger manufacturers reporting on Level 2 ADAS reports will require more time to submit 5-day reports than smaller entities submitting 5-day reports for ADS crashes. Therefore, NHTSA has decided to change its estimate based on the mid-point estimate provided by Auto Innovators. Accordingly, the agency estimates that 5-day reports takes, on average, 20 hours. Therefore, the agency estimates the total annual burden hours for submitting Level 2 ADAS 5-day crash reports to be 18,400 hours (20 hours × 920 crash reports) for all reporting entities for an average of 920 hours for each of the estimated 20 reporting entities submitting 5-day incident reports.

Burden Category 4: ADS 1-Day Reports Under Request No. 1.

As discussed above, NHTSA now estimates that it will receive 30 ADS 1-day incident reports each year. In the 60-day notice, NHTSA estimated that it would take respondents approximately 2 hours to compile and submit each crash report. The agency received comments from Auto Innovators, MEMA, and the Self-Driving Coalition stating that the agency had underestimated the burden hours for the reporting requirements. Specifically, Auto Innovators stated that a more accurate estimate would be 8 hours for each 1-day incident report and the Self-Driving Coalition stated that 1-day reports take between 5 and 12 hours. Based on these comments, the agency now estimates that 1-day reports takes, on average, 8 hours. Therefore, the agency estimates the total annual burden hours for submitting ADS 1-day crash reports to be 240 hours (8 hours × 30 crash reports) for all manufactures. Based on the five months of reporting experience, the agency believes that some respondents with ADS 1-day reports will file multiple reports. At this time, the agency estimates that the 30 1-day reports will be submitted by 20 manufacturers, for an average of 12 hours per respondent.

Burden Category 5: ADS 5-Day Reports under Request No. 1.

As discussed above, NHTSA now estimates that it will receive 120 ADS 1-day incident reports each year. In the 60-day notice, NHTSA estimated that it would take respondents approximately 2 hours to compile and submit each 1-day crash report. The agency received comments from Auto Innovators, MEMA, and the Self-Driving Coalition stating that NHTSA had underestimated the burden hours for the reporting requirements. Specifically, Auto Innovators stated that a more accurate estimate would be 8 hours for each 1-day incident report and the Self-Driving Coalition stated that 1-day reports take between 5 and 12 hours. The agency also received comments from Auto Innovators and the Self-Driving Coalition stating that updated reports may take longer to submit than initial reports. Because reporting entities will not be required to submit 10-day update reports for incidents required to be submitted to the agency within five business days, and because after five days more information may be available for review, the agency is basing its estimate of burden for 5-day reports off the burden estimates provided by commenters for the 10-day update report. Auto Innovators stated that it would take 20 hours to submit updates and the Self-Driving Coalition stated that it would take between 3 and 24 hours, depending on the complexity of the incident. Because the agency estimates that information will be more readily accessible to reporting entities for incidents involving ADS, NHTSA estimates that 5-day reports take, on average, 14 hours (based on the mid-point between 3 and 24 hours). Therefore, the agency estimates the total annual burden hours for submitting ADS 5-day crash reports to be 1,680 hours (14 hours × 120 crash reports) for all reporting entities. Based on the number of respondents that have submitted ADS reports under the General Order thus far, the agency estimates that it will receive ADS 5-day reports from an average of 40 entities each year. Therefore, the average annual burden per reporting entity is estimated to be 42 hours.

Burden Category 6: ADS 10-Day Reports under Request No. 1.

As discussed above, in addition to submitting information on certain ADS crashes within one day, reporting entities must also submit updated information within ten days. NHTSA has decided to only require 10-day update reports for incidents required to be reported within one calendar day. In the 60-day notice, NHTSA estimated that providing updated crash reports would take approximately 1 hour per report. However, both Auto Innovators and the Self-Driving Coalition submitted comments stating that the agency underestimated the burden for submitting the reports. Auto Innovators stated that it would take 20 hours to submit updates and the Self-Driving Coalition stated that it would take between 3 and 24 hours, depending on the complexity of the incident. Because the agency estimates that information will be more readily accessible to reporting entities for incidents involving ADS, NHTSA estimates that 5-day reports take, on average, 14 hours (based on the mid-point between 3 and 24 hours). Therefore, the agency estimates

that the total burden for submitting 10-day update reports for ADS incidents to be 420 hours for all ADS manufacturers and operators (14 hours × 30 crash reports). As discussed above, the agency estimates that it will receive one-day ADS incident reports from 20 respondents each year. Therefore, the agency estimates that the annual burden is, on average, 21 hours per respondent.

Burden Category 7: Monthly ADS Incident Reports Under Request No. 2.

As described above, NHTSA now estimates that there will be 200 ADS crash reports required to be submitted on the fifteenth of the month following the month in which notice of the crash was received. In the 60-day notice, NHTSA estimated that preparing and submitting monthly reports that contain crash reports takes, on average, 2 hours to prepare and submit. However, the agency received a comment from the Self-Driving Coalition stating that the actual burden for this can be between 2 and 24 hours. Based on this comment, NHTSA now estimates that the burden associated with preparing and submitting initial ADS crash report information that will be submitted in monthly reports to be 14 hours per report, for a total of 2,800 hours (14 hours × 200 reports). Based on the number of respondents that have submitted ADS crash report information, the agency estimates that it will receive reports from approximately 50 entities each year, for an average of 56 hours per entity.

Burden Category 8: ADAS Supplemental Reports Under Request No. 3.

In addition to submitting information about new ADS crashes in monthly reports, respondents also are required to submit updated information in the following month if any new material or materially different information about any Level 2 ADAS incident is received. In its 60-day notice, NHTSA estimated that it would receive 170 ADAS monthly supplemental reports per year. With the benefit of 5 months of reporting experience, the agency revises this estimate to 75 supplemental ADAS reports each year. In the 60-day notice, NHTSA estimated that providing updated information within a monthly report would take 1 hour. The agency received comments indicating that it had underestimated burden, but it did not receive specific comments on the time spent submitting a supplemental report on the fifteenth of the month following the month in which it received any material new or materially different information. The agency believes that submitting a supplemental report should take less time that submitting an initial report or a ten-day update report. However, the agency concedes that reporting entities may require more time for internal review than 1 hour. Accordingly, the agency now estimates that preparing and submitting supplemental reports takes, on average, 5 hours. Therefore, the agency estimates the burden for monthly reports with updated information to be 375 hours (75 monthly reports × 5 hours). The agency estimates that it will receive, on average, supplemental Level 2 ADAS monthly reports from 20 respondents each year, for an average of 18.75 hours per respondent.

Burden Category 9: ADS Supplemental Reports Under Request No. 3.

In addition to submitting information about new ADS crashes in monthly reports, respondents also are required to submit updated information in the following month if any new material or materially different information about any ADS incident is received. In its 60-day notice, NHTSA estimated that it would receive 25 ADS monthly supplemental reports per year. With the benefit of 5 months of reporting experience, the agency revises this estimate to 40 supplemental ADS reports each year. In the 60-day notice, NHTSA estimated that providing updated information within a monthly report would take 1 hour. The agency received comments indicating that it had underestimated burden, but it did not receive specific comments on the time spent submitting a supplemental report on the fifteenth of the month following the month in which it received any material new or materially different information. The agency believes that submitting a supplemental report should take less time than submitting an initial report or a ten-day update report. However, the agency concedes that reporting entities may require more time for internal review than 1 hour. Accordingly, the agency now estimates that preparing and submitting supplemental reports takes, on average, 5 hours. Therefore, the agency estimates the burden for monthly reports with updated information to be 200 hours (40 monthly reports × 5 hours). The agency estimates that it will receive, on average, monthly reports from 25 respondents each year, for an average of 8 hours per respondent.

Burden Category 10: Monthly Reports under Request No. 4.

A reporting entity that determines it has no information reportable under Request Nos. 2 and 3 is required to submit a report confirming the lack of any such reportable information. The hourly burden associated with submitting a monthly report under Request No. 4 is minimal. The reporting entity need only select the proper type of report, identify the date and month for which the report is being submitted, and then submit the report.

In the 60-day notice, NHTSA estimated that the burden for ADS manufacturers and operators associated with preparing and submitting any monthly reports to be 15 minutes. The agency received one comment from the Self-Driving Coalition that confirmed that 15 minutes was accurate for its members. The agency estimated that burden for ADAS manufacturers associated with preparing and submitting any monthly reports would be 2 hours. The agency received a comment from Auto Innovators stating that monthly reports under Request No. 4 take respondents 20 hours to prepare and submit.

NHTSA does not agree that submitting a report under Request No. 4 (confirming the lack of information reportable under Request Nos. 2 and 3) will take 20 hours. The agency believes that reporting entities should not have any additional burden associated with confirming that they do not have reportable information. Instead, NHTSA believes that respondents have screening processes to ensure they are meeting their requirements to submit reports under Requests Nos. 1, 2, and 3 under the General Order. NHTSA believes that adequate screening processes should ensure that there is no additional burden associated with monthly reports under Request 4. However, as mentioned by some of the commenters, the agency did not estimate any ongoing burden for enhanced screening processes. In response, NHTSA is creating a new category of burden to account for any screening that is incurred in response to the General Order and is not part of reporting entities' standard operating practices.

In its 60-day Notice, NHTSA estimated that 80% of the reporting entities each month will submit a report under Request No. 4. Based on five months of reporting under the General Order, NHTSA continues to estimate that 80% of reporting entities will submit a report under Request No. 4 each month. Based on an average of 110 total reporting entities per year, the agency estimates that it will receive 1,056 reports annually under Request No. 4.

Accordingly, NHTSA estimates that preparing and submitting a monthly report under Request No. 4 will take 15

minutes for the estimated 90 ADS reporting entities and the estimated 20 manufacturers of Level 2 ADAS vehicles each year (including manufacturers that produce both Level 2 ADAS vehicles and ADS vehicles). Therefore, the agency estimates that annually respondents will spend 264 hours preparing and submitting monthly reports under Request No. 4, not including burden associated with providing new or updated reportable information (110 respondents × .8 × 12 monthly reports × 0.25 hours).

Burden Category 11: Additional Screening.

As discussed above, and in response to comments, NHTSA is adding a new category for screening. NHTSA received comments from both the Self-Driving Coalition and Auto Innovators regarding uncounted burden. Specifically, Auto Innovators stated that NHTSA had not counted burden for monitoring for new crashes and the Self-Driving Coalition stated that NHTSA had not included time spent reviewing incidents that occur but are not reportable. In response to these comments, NHTSA is adding a new burden category for additional time spent screening incoming information. The additional time allotted for screening accounts for any additional processes reporting entities have needed to put in place to ensure that they are meeting their reporting requirements under the General Order. This time does not account for screening of incidents that reporting entities conducted as part of its standard business practices prior to the General Order. Although NHTSA did not receive comments about the amount of additional burden respondents will incur, NHTSA believes that the Auto Innovator's comment regarding burden for ''no reportable information'' monthly reports provides an indication of the additional time some entities spend each month ensuring that they are meeting their reporting obligations. Specifically, Auto Innovators provided a monthly average estimate of 20 burden hours. Since manufacturers and operators of ADS-equipped vehicles and equipment already had robust processes for identifying and analyzing crashes that might occur with these vehicles, NHTSA estimates that the additional screening burden will only be incurred by entities reporting on Level 2 ADAS crashes, as those reports largely involve crashes in the consumer fleet. Accordingly, the agency estimates that the estimated 20 entities reporting on Level 2 ADAS incidents have, on average, 20 hours of additional screening time per month, for a total of 4,800 hours a year (20 hours × 12 months × 20 respondents), or 240 hours per reporting entity.

Burden Category 12: Training employees on the reporting requirements.

In addition to the burden associated with preparing and submitting reports, any new reporting entities added to the General Order are also expected to incur burden associated with training employees on the reporting requirements. As explained above, the existing 108 reporting entities named in the General Order will not incur this burden during the requested extension because they have already trained their employees. NHTSA estimates that there will be an average of seven new reporting entities added to the General Order each year during the proposed extension, that an average of five of these new reporting entities will be ADS manufacturers or operators and that an average of two of these new reporting entities will be Level 2 ADAS manufacturers.

The agency expects that ADS manufacturers and operators normally monitor all crashes and, therefore, will not need to train personnel on how to respond to this new information collection. NHTSA does expect, however, that some Level 2 ADAS manufacturers may need to spend time training personnel on the requirements. Although the amount of time may vary by manufacturer, NHTSA estimates that, on average, the two Level 2 ADAS manufacturers will spend 40 hours on training. Therefore, NHTSA estimates the total annual burden for training to be 80 hours (2 manufacturers × 40 hours).

Burden Category 13: Time to set up an account to submit the reports.

NHTSA also estimates that new responding entities added to the General Order during the proposed extension period will need to set up a new account with the agency to allow them to submit reports. NHTSA estimates that each of the estimated average of 10 responding entities added to the General Order annually need to set up new accounts with the agency. NHTSA estimates that setting up an account will take 2 hours. Therefore, the agency estimates the total annual burden to be 20 hours.

NHTSA estimates the total annual burden hours for the thirteen components of this ICR to be 31,319 hours (640 hours for initial one-day Level 2 ADAS reports, 1,600 hours for updated one-day Level 2 ADAS reports, 18,400 hours for five-day Level 2 ADAS reports, 240 hours for initial one-day ADS reports, 420 hours for updated ADS reports, 1,680 hours of five-day ADS reports, 2,600 hours for monthly initial ADS reports, 375 hours for monthly supplemental Level 2 ADAS reports, 200 hours for monthly supplemental ADS reports, 264 hours for ''no reportable information'' monthly reports, 4,800 for additional screening, 80 hours for training, and 20 hours for setting up accounts). This revised estimate reflects five months of crash reporting experience under the existing clearance, which allows the agency to refine and better estimate the annual volumes of different types of reports it will receive. This revised estimate also reflects the agency's adoption of commenters' estimates of the hours required for individual burden tasks. Although the agency believes that the commenters' estimates may represent the high end of the range of burden hours for respondents, and not the average, the commenters' estimates are the best data currently available to the agency. Table 1 provides a summary of the estimated burden hours.

TABLE 1—BURDEN HOUR ESTIMATES

Description of burden category (this ICR is for one IC)	Number of responses	Number of respondents	Estimated burden per response	Burden per respondent (hours)	Total burden hours
Level 2 ADAS one-day reports, initial Request No. 1	80	20	8 hours	32	640
Level 2 ADAS one-day reports, update Request No. 1	80	20	20 hours	80	1,600
Level 2 ADAS five-day reports Request No. 1	920	20	20 hours	920	18,400
ADS one-day reports, initial Request No. 1	30	20	8 hours	12	240
ADS one-day reports, update Request No. 1	30	20	14 hours	21	420
ADS five-day reports Request No. 1	120	40	14 hours	42	1,680
Monthly Report-Initial ADS Request No. 2	200	50	13 hours	52	2,600

TABLE 1—BURDEN HOUR ESTIMATES—Continued

Description of burden category (this ICR is for one IC)	Number of responses	Number of respondents	Estimated burden per response	Burden per respondent (hours)	Total burden hours
Monthly Report-Level 2 ADAS Supplemental Request No. 3.	75	20	5 hours	18.75	375
Monthly Report-ADS Supplemental Request No. 3	40	25	5 hours	8	200
Monthly Reports-No reportable Information Request No. 4	1,056	110	15 minutes	3	264
Additional Screening	0	20	240 hours	240	4,800
Training	0	2	40 hours	40	80
Setting Up Account	0	10	2 hours	2	20
Total for ICR: Level 2 ADAS/ADS Incident Reporting	2,631	110	11.90 hours	284.72	31,319

In the 60-day notice, NHTSA calculated the burden associated with the labor hours using the average wage for architectural and engineering managers in the motor vehicle manufacturing industry (Standard Occupational Classification # 11–9041). NHTSA received one comment, from Auto Innovators, stating that the labor cost estimate was too low, and that a labor cost of at least $120 per hour was more realistic. In response to this comment, NHTSA has reexamined its estimate and adjusted its estimates recognizing that there are multiple wage categories involved with the labor hours. Specifically, NHTSA is now allocating the burden hours across four labor categories: Architectural and engineering managers in the motor vehicle manufacturing industry (Standard Occupational Classification # 11–9041); engineers (Standard Occupational Classification # 17–2000); Computer and Information Systems Managers (Standard Occupational Classification # 11–3021); and Lawyers (Standard Occupational Classification # 23–1000).

To calculate the labor cost associated with preparing and submitting crash reports and monthly reports, training, and setting up new accounts, NHTSA looked at wage estimates for the type of personnel involved with these activities. NHTSA estimates the total labor costs associated with these burden hours by looking at the seventy-fifth percentile wage for architectural and engineering managers, computer and information systems managers, and engineers in the motor vehicle manufacturing industry and the seventy-fifth percentile wage for lawyers.[11] The Bureau of Labor Statistics estimates that private industry workers'' wages represent 70.4% of total labor compensation costs.[12] Therefore, NHTSA has weighted the wages accordingly. Table 2 provides an hourly labor cost estimate for each labor category.

TABLE 2—HOURLY LABOR COSTS

Labor category	Wage	Hourly labor cost
Computer and Information System Managers (11–13021) in the Motor Vehicle Manufacturing Industry (75th percentile)	$89.94	$127.76
Architectural and Engineering Managers (11–9041) in the Motor Vehicle Manufacturing Industry (75th percentile)	77.37	109.90
Engineers (17–2000) in the Motor Vehicle Manufacturing Industry (75th percentile)	54.32	77.16
Lawyers (23–1011) (75th percentile)	91.11	129.42

Using the hourly labor cost estimates above, NHTSA estimates that the total labor costs associated with the 31,319 hours is $3,290,351.24.

Table 3 provides a summary of the estimated labor costs.

TABLE 2—LABOR COST ESTIMATES

Description of information collection component	Total hours and labor cost per response for computer and information system managers (11–13021)	Total hours and labor cost per response for architectural and engineering managers (11–9041)	Total hours and labor cost per response for engineers (17–2000)	Total hours and labor cost per response for lawyers (23–1011)	Total labor cost per response	Total labor cost
Level 2 ADAS one-day reports, initial.	1 hour, $127.76	2 hours, $219.80.	3 hours, $231.48.	2 hours, $258.84.	$837.88	$67,030.40
Level 2 ADAS one-day reports, update.	1 hour, $127.76	6 hours, $659.40.	7 hours, $540.12.	6 hours, $776.52.	2,103.80	168,304.00
Level 2 ADAS five-day reports	1 hour, $127.76	6 hours, $659.40.	7 hours, $540.12.	6 hours, $776.52.	2,103.80	1,935,496.00

[11] *See* May 2020 National Industry-Specific Occupational Employment and Wage Estimates, NAICS 336100—Motor Vehicle Manufacturing, available at *https://www.bls.gov/oes/current/naics4_336100.htm#15–0000* (accessed December 17, 2021) and May 2020 National Occupational Employment and Wage Estimates, available at *https://www.bls.gov/oes/current/oes_nat.htm* (accessed December 17, 2021).

[12] *See* Table 1. Employer Costs for Employee Compensation by ownership (Mar. 2021), available at *https://www.bls.gov/news.release/ecec.t01.htm* (accessed December 17, 2021).

TABLE 2—LABOR COST ESTIMATES—Continued

Description of information collection component	Total hours and labor cost per response for computer and information system managers (11–13021)	Total hours and labor cost per response for architectural and engineering managers (11–9041)	Total hours and labor cost per response for engineers (17–2000)	Total hours and labor cost per response for lawyers (23–1011)	Total labor cost per response	Total labor cost
ADS one-day reports, initial	1 hour, $127.76,	2 hours, $219.80.	3 hours, $231.48.	2 hours, $258.84.	837.88	25,136.40
ADS one-day reports, update	1 hour, $127.76	4 hours, $439.60.	5 hours, $385.80.	4 hours, $517.68.	1,470.84	44,125.20
ADS five-day reports	1 hour, $127.76	4 hours, $439.60.	5 hours, $385.80.	4 hours, $517.68.	1,470.84	176,500.80
Monthly Report-Initial ADS	1 hour, $127.76	3 hours, $329.70.	6 hours, $540.12.	3 hours, $388.26.	1,385.84	277,168.00
Monthly Report-Level 2 ADAS Supplemental.	1 hour, $127.76	1 hour, $109.90	2 hours, $154.32.	1 hour, $129.42	521.40	39,105.00
Monthly Report-ADS Supplemental.	1 hour, $127.76	1 hour, $109.90	2 hours, $154.32.	1 hour, $129.42	521.40	20,856.00
Monthly Reports-No Reportable Information.	0 hours, $0	0 hours, $0	15 minutes, $19.29.	0 hours, $0	19.29	20,370.24
Additional Screening	12 hours, $1,533.12.	72 hours, $7,912.80.	84 hours, $6,481.44.	72 hours, $9318.24.	25,245.60	504,912.00
Training	0 hours, $0	40 hours, $4,396.	0 hours, $0	0 hours, $0	4,396	8,792
Setting Up Account	2 hours, $255.52.	0 hours, $0	0 hours, $0	0 hours, $0	255.52	2,555.20
Total						$3,290,351.24

Estimated Total Annual Burden Cost: $0.

In the 60-day notice, NHTSA stated that it did not know whether manufacturers would incur additional costs, nor did it have a basis for estimating these costs. In the notice, NHTSA sought comment on whether manufacturers will incur any additional costs associated with complying with the new reporting requirements, such as investing in new IT infrastructure. In response, NHTSA received one comment from Auto Innovators, which stated that ''in addition to the cost of labor associated with the handling of the crash information, there are also fiscal burdens associated with the hardware and software infrastructure to monitor and manage crash reporting.'' They further stated that reporting entities have already invested significant resources into setting up internal processes for the handling of crash information, which often include IT systems that come at a financial cost. The comment, however, did not provide sufficient information for NHTSA to estimate additional annual costs to reporting entities. Until NHTSA has more information on additional costs, NHTSA continues to estimate that annual costs to respondents is $0.

Public Comments Invited: You are asked to comment on any aspects of this information collection, including (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (b) the accuracy of the Department's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; 49 CFR 1.49; and DOT Order 1351.29.

Ann E. Carlson,

Chief Counsel.

[FR Doc. 2021–28311 Filed 12–28–21; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF THE TREASURY

Coronavirus Relief Fund; Notice of Availability

AGENCY: Department of the Treasury.

ACTION: Notification.

SUMMARY: This notification announces that the U.S. Department of the Treasury (Treasury) has revised its guidance regarding the Coronavirus Relief Fund (CRF) for States, Tribal governments, and certain eligible local governments and made this revision available on its website, *https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/coronavirus-relief-fund.*

FOR FURTHER INFORMATION CONTACT: Katharine Richards, Senior Advisor, Office of Recovery Programs, Department of the Treasury, (844) 529–9527.

SUPPLEMENTARY INFORMATION: Treasury has revised its previously issued CRF guidance regarding the requirement in the CARES Act that payments from the CRF may only be used to cover costs that were incurred during the period that begins on March 1, 2020, and ends on December 31, 2021.

Dated: December 17, 2021.

Jacob Leibenluft,

Chief Recovery Officer, Office of Recovery Programs, U.S. Department of the Treasury.

[FR Doc. 2021–28267 Filed 12–28–21; 8:45 am]

BILLING CODE 4810–AK–P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Proposed Collection; Comment Request; Capital Projects Fund

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other federal agencies to comment on the proposed information collections listed below, in accordance with the Paperwork Reduction Act of 1995.

DATES: Written comments must be received on or before February 28, 2022.

ADDRESSES: Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestions for reducing the burden, by the following method:

• *Federal E-rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Refer to Docket Number TREAS–DO–2021–0022 and the specific Office of Management and Budget (OMB) control number 1505–0274.

FOR FURTHER INFORMATION CONTACT: For questions related to this program, please contact Jeremy Turret by emailing *Jeremy.Turret@treasury.gov,* or calling 202–622–4256. Additionally, you can view the information collection requests at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

Title: Coronavirus Capital Projects Fund.

OMB Control Number: 1505–0274.

Type of Review: Extension of a currently approved collection.

Description: Section 604 of the Social Security Act (the ''Act''), as added by section 9901 of the American Rescue Plan Act of 2021, Public Law 117–2 (Mar. 11, 2021) established the Coronavirus Capital Projects Fund (''CPF''). The CPF provides $10 billion in funding for the U.S. Department of the Treasury (''Treasury'') to make payments according to a statutory formula to States (defined to include each of the 50 states, the District of Columbia, and Puerto Rico), seven territories and freely associated states (the United States Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau), and Tribal governments [1] ''to carry out critical capital projects directly enabling work, education, and health monitoring, including remote options, in response to the public health emergency with respect to the Coronavirus Disease (COVID–19).

Forms: Grant Applications (States, Territories, and Freely Associated States); Grant Applications (Tribal Governments); and Grant Plans (States, Territories, and Freely Associated States.

Affected Public: State, Tribal, Territorial, and Freely Associated State Governments.

Estimated Number of Respondents: 715.

Frequency of Response: Once.

Estimated Total Number of Annual Responses: 715.

Estimated Time per Response: 1 or 2 hours for Grant Applications. 60 hours for Grant Plans.

Estimated Total Annual Burden Hours: 4,793.

Request for Comments: Comments submitted in response to this notice will be summarized and included in the request for Office of Management and Budget approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information 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 technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services required to provide information.

Authority: 44 U.S.C. 3501 *et seq.*

Dated: December 22, 2021.

Molly Stasko,

Treasury PRA Clearance Officer.

[FR Doc. 2021–28229 Filed 12–28–21; 8:45 am]

BILLING CODE 4810–AK–P

[1] An eligible Tribal government is the recognized governing body of any Indian or Alaska Native tribe, band, nation, pueblo, village, community, component band, or component reservation, individually identified (including parenthetically) in the list published most recently as of the date of enactment of this Act pursuant to section 104 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 5131). The State of Hawaii, for exclusive use of the Department of Hawaiian Home Lands and the Native Hawaiian Education Programs to assist Native Hawaiians, is also eligible to apply for funding under this funding category.

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Multiple Fiscal Service Information Collection Requests

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury will submit the following information collection requests to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. The public is invited to submit comments on these requests.

DATES: Comments should be received on or before January 28, 2022 to be assured of consideration.

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.

FOR FURTHER INFORMATION CONTACT: Copies of the submissions may be obtained from Spencer W. Clark by emailing *PRA@treasury.gov,* calling (202) 927–5331, or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

Bureau of the Fiscal Service (BFS)

1. Title: Annual Letters—Certificate of Authority (A) and Admitted Reinsurer (B).

OMB Control Number: 1530–0014.

Type of Review: Extension without change of a currently approved collection.

Description: Annual letters sent to insurance companies providing surety bonds to protect the U.S. or companies providing reinsurance to the U.S. Information needed for renewal of certified companies and their underwriting limitations, and of admitted reinsurers.

Form: Annual Letter to Executive Officers of Surety Companies Reporting to the Treasury (A) and the Annual Letter to Executive Officers of Companies Recognized by the Treasury as Admitted Reinsurers of Surety Companies Doing Business with the United States Government (B).

Affected Public: Individuals and households.

Estimated Number of Respondents: 341.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 341.

Estimated Time per Response: 18 hours, 45 minutes.

Estimated Total Annual Burden Hours: 6,394.

2. Title: Request for Payment of Federal Benefit by Check, EFT Waiver Form.

OMB Control Number: 1530–0019.

Type of Review: Extension without change of a currently approved collection.

Description: 31 CFR part 208 requires that all Federal non-tax payments be made by electronic funds transfer (EFT). This form is used to collect information from individuals requesting a waiver from the EFT requirement because of a mental impairment and/or who live in a remote geographic location that does not support the use of EFT. These individuals may continue to receive payment by check. However, 31 CFR part 208 requires individuals requesting one of these waiver conditions to submit a written justification.

Form: FS Form 1201W, FS Form 1201W (SP), FS Form 1201W-DFAS.

Affected Public: Individuals and households.

Estimated Number of Respondents: 3,250.

Frequency of Response: On Occasion.

Estimated Total Number of Annual Responses: 3,250.

Estimated Time per Response: 20 minutes.

Estimated Total Annual Burden Hours: 1,083.

3. Title: Claim For Lost, Stolen or Destroyed U.S. Savings Bonds and Supplemental Statement For U.S. Securities.

OMB Control Number: 1530–0021.

Type of Review: Extension without change of a currently approved collection.

Description: The information is necessary to apply for relief on account of the loss, theft, or destruction of United States Savings Bonds or the non-receipt of United States Securities.

Form: FS Form 1048, FS Form 2243.

Affected Public: Individuals and households.

Estimated Number of Respondents: 72,000.

Frequency of Response: On Occasion.

Estimated Total Number of Annual Responses: 72,000.

Estimated Time per Response: 17 minutes.

Estimated Total Annual Burden Hours: 20,352.

4. Title: Request by Fiduciary for Reissue of United States Savings Bonds.

OMB Control Number: 1530–0035.

Type of Review: Extension without change of a currently approved collection.

Description: One or more fiduciaries (individual or corporate) must use this form to establish entitlement and request distribution of United States Treasury Securities and/or related payments to the person lawfully entitled due to termination of a trust, distribution of an estate, attainment of majority, restoration to competency, or other reason.

Form: FS Form 1455.

Affected Public: Individuals and households.

Estimated Number of Respondents: 9,500.

Frequency of Response: On Occasion.

Estimated Total Number of Annual Responses: 9,500.

Estimated Time per Response: 30 minutes.

Estimated Total Annual Burden Hours: 4,750.

Authority: 44 U.S.C. 3501 *et seq.*

Dated: December 23, 2021.

Spencer W. Clark,

Treasury PRA Clearance Officer.

[FR Doc. 2021–28304 Filed 12–28–21; 8:45 am]

BILLING CODE 4810–AS–P900

FEDERAL REGISTER

Vol. 86 Wednesday,

No. 247 December 29, 2021

Part II

Department of Transportation

National Highway Traffic Safety Administration

49 CFR Parts 531 and 533

Corporate Average Fuel Economy (CAFE) Preemption; Final Rule

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Parts 531 and 533

[Docket No. NHTSA–2021–0030]

RIN 2127–AM33

Corporate Average Fuel Economy (CAFE) Preemption

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: This document finalizes NHTSA's proposal to repeal in full ''The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program,'' published September 27, 2019 (SAFE I Rule), in which NHTSA codified regulatory text and made additional pronouncements regarding the preemption of state and local laws related to fuel economy standards. NHTSA originally proposed to repeal the SAFE I Rule in a Notice of Proposed Rulemaking entitled ''Corporate Average Fuel Economy Preemption,'' which was published on May 12, 2021. After evaluating all public comments submitted for this Proposal, the Agency is finalizing the Proposal. As such, the Agency is repealing all regulatory text and appendices promulgated in the SAFE I Rule. In doing so, the Agency underscores that any positions announced in preambulatory statements of prior NHTSA rulemakings, including in the SAFE I Rule, which purported to define the scope of preemption under the Energy Policy and Conservation Act (EPCA), do not reflect the Agency's reconsidered understanding of its proper role in matters of EPCA preemption. Through this final rule, NHTSA makes clear that no prior regulations or positions of the Agency reflect ongoing NHTSA views on the scope of preemption of states or local jurisdictions under EPCA.

DATES: This action is effective on January 28, 2022.

Petitions for Reconsideration: Pursuant to 49 CFR 553.35, petitions for reconsideration of this final rule must be received not later than February 14, 2022.

ADDRESSES: Any petitions for reconsideration should refer to the docket number of this document and be submitted to: Deputy Administrator, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE, West Building, Fourth Floor, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Hunter B. Oliver, Office of Chief Counsel, NHTSA, telephone (202) 366–5263, facsimile (202) 366–3820, 1200 New Jersey Ave. SE, Washington, DC 20590.

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I. Overview of Final Rule

A. Summary of Proposal

On May 12, 2021, NHTSA published in the **Federal Register** a Notice of Proposed Rulemaking (NPRM or Proposal) entitled ''Corporate Average Fuel Economy (CAFE) Preemption,'' which set forth the proposal that NHTSA is finalizing today.[1] As explained in the Proposal, this NPRM considered a repeal of NHTSA's portion of a joint agency action completed by NHTSA and the Environmental Protection Agency (EPA) in 2019, ''The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program'' (SAFE I Rule or Rule).[2] In the SAFE I Rule, NHTSA and EPA finalized a joint agency action relating to the state regulation of greenhouse gas (GHG) emissions from motor vehicles and state mandates for zero emission vehicles (ZEVs). In that action, NHTSA codified regulatory text and appendices, which expressly declared that certain types of state regulation were preempted due to a perceived irreconcilable conflict with the Agency's fuel economy standards. In addition, the Agency published further statements in the preambles of the SAFE I rulemaking, which described various types of state regulations as preempted. As part of the SAFE I action, EPA also withdrew portions of a waiver that EPA had previously extended to the California Air Resources Board (CARB) under Section 209 of the Clean Air Act to regulate new motor vehicle emissions through GHG standards and a ZEV mandate.[3]

On January 20, 2021, President Biden signed Executive Order 13990, ''Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis,'' which, among other actions, directed DOT, NHTSA, and EPA to immediately review and consider suspending, revising, or rescinding their respective portions of the SAFE I Rule. NHTSA's resulting comprehensive assessment of the SAFE I Rule identified potential problems relating to both the legal authority claimed by NHTSA for the rulemaking and the degree to which the categorical prohibitions announced by the Agency failed to appropriately account for the substantial and often nuanced state interests in the measures purportedly preempted by the SAFE I Rule. As a result of these considerations, NHTSA published the NPRM, to propose a repeal of the SAFE I Rule and to solicit public comment on the Agency's concerns about the legality and prudence of the rulemaking. On April 28, 2021, EPA outlined its own review of the EPA aspects of the SAFE I joint agency action, publishing a Notice of Opportunity for Public Hearing and Comment that proposed a reconsideration of EPA's withdrawal of California's waiver under the Clean Air Act.[4] Both agencies have expressly recognized that their respective reconsideration proposals are separate, independent proceedings.[5]

[1] *See* DOT, NHTSA, Notice of Proposed Rulemaking, Corporate Average Fuel Economy (CAFE) Preemption, 86 FR 25980 (May 12, 2021) (referred to in subsequent citations as ''CAFE Preemption NPRM'').

[2] *See generally* NHTSA, EPA, Withdrawal of Waiver; Final Rule, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, Final Rule, 84 FR 51310 (Sept. 27, 2019).

[3] Unless otherwise stated herein, all references to the SAFE I Rule and any associated discussions in this final rule refer only to NHTSA's portions of the SAFE I action and do not include any EPA actions on the California waiver.

[4] *See generally* EPA, Notice of Opportunity for Public Hearing and Comment, 86 FR 22421 (Apr. 28, 2021).

[5] *See id.* at 22422 n.3 (''This action is being issued only by EPA and, therefore, does not bear upon any future or potential action NHTSA may take regarding its decision or pronouncements in SAFE I.''); CAFE Preemption NPRM, 86 FR 25981 n.3 (''This proposed rule is being issued only by NHTSA. As such, to the extent EPA subsequently undertakes an action to reconsider the revocation of California's Section 209 waiver, such action would occur through a separate, independent proceeding.'').

In the CAFE Preemption NPRM, NHTSA proposed to repeal the SAFE I Rule for several independent reasons. First, the Agency repeatedly expressed substantial doubts regarding the legal validity of the Rule. As the NPRM explained, NHTSA became concerned about whether the Agency possesses the authority to define the scope of EPCA through rulemaking. Accordingly, NHTSA proposed to repeal and withdraw the codified regulations and appendices, as well as any associated interpretations or views on EPCA preemption contained in the SAFE I Rule, including in the regulatory text of Sections 531.7, 533.7, and appendices B to Parts 531 and 533.

In the Proposal, NHTSA recognized that the statutory preemption provision in EPCA, Section 32919, was self-executing. In this respect, Section 32919 is able to preempt state or local laws directly, without the need for a DOT or NHTSA regulation that further implements either EPCA preemption or this particular statutory provision. As such, the statutory provision is both standalone and fails to articulate any role for the Agency in further dictating a preemptive scope. Accordingly, the NPRM proposed that Section 32919 and EPCA were more appropriately read as indicating that Congress did not intend to empower NHTSA to define preemption in this manner. As a result, NHTSA's Proposal expressed concern that in the SAFE I Rule, the Agency acted outside of its delegated authority by publishing regulations and pronouncements that sought to do just such a thing. Accordingly, the NPRM proposed to repeal the SAFE I Rule.

In addition, the Proposal also articulated a separate basis for repealing the entirety of the SAFE I Rule, which rested upon the inappropriateness of such a sweeping pronouncement of preemption. Even if EPCA had imbued NHTSA with power to dictate preemption through regulations, the expansive manner in which this authority was wielded in the SAFE I rulemaking failed to appropriately account for a variety of important considerations. These include legally relevant factors, such as the substantial federalism interests of states and local jurisdictions who had long relied on programs to address environmental hazards in their local communities or comply with other federal air pollution requirements. In addition, the categorical and generally applicable scope of the SAFE I Rule also precluded consideration of other fact-specific attributes of particular programs, many of which represent diverse characteristics that bear upon the application of EPCA preemption and the accuracy of any ensuing preemption analysis. Many of these factors—some of which were not even discussed in the SAFE I rulemaking—strongly suggest that a more considered and circumscribed dispensation of any preemption authority would more narrowly tailor any preemptive pronouncements to better account for the diverse, nuanced, and relied upon federalism interests of the preempted state governments and their constituents. As described further below, these concerns were raised and expressed by a significant number of public comments, especially from those local jurisdictions most affected by the rulemaking. These jurisdictions described numerous unique considerations regarding their programs that the SAFE I Rule's absolute proclamation of preemption did not fully contemplate. These considerations reflected the Agency's similar concerns in the NPRM, which proposed to repeal the SAFE I Rule in its entirety in order to establish a ''clean slate,'' that restores NHTSA's longstanding practice of undertaking a more careful and particularized role in the EPCA preemption discourse.

Finally, even apart from the lack of rulemaking authority and the overly broad manner of the SAFE I Rule's prohibitions, the NPRM also proposed a repeal of the SAFE I Rule in order to remove the regulation that overcomplicated or potentially confused an otherwise direct application of Section 32919's statutory standards. In connection with a proposed repeal of the regulatory text from the SAFE I Rule, the NPRM also proposed to clarify that, to the extent prior statements from rulemaking preambles (from the SAFE I Rule or otherwise) discussed aspects of EPCA preemption or could be read as interpretative views on the subject, those statements should not be read as continuing views of the Agency. While this clarification was not legally necessary, NHTSA still considered it worthwhile because the inconsistent nature of many of the Agency's prior statements on EPCA preemption and the oftentimes imperative language utilized in such statements—especially during the SAFE I rulemaking—risked a confusing landscape in which regulated entities and the public were unsure of the precise legal effect of Agency statements that purported to control EPCA's preemptive reach. Moreover, NHTSA felt that many of those statements, particularly in the preambles of the SAFE I Rule, contained sweeping and definitive language on preemption, which left no room for nuance or further deliberation about particular programs, and obscured the Agency's ongoing internal consideration of whether EPCA actually enacted a narrower scope of preemption than claimed in the rulemaking. In light of these considerations, the NPRM proposed to expressly disclaim any of these prior statements to make clear they no longer accurately reflected the Agency's position on the issue.

B. Public Participation Opportunities and General Overview of Comments

The public docket opened for this rulemaking following the **Federal Register** publication of the NPRM on May 12, 2021. The public comment period spanned 30 days, with comments due on June 11, 2021. During that time, the Agency received 445 comments. As of the date of today's final rule, NHTSA has not received any late comments posted after the close of the comment period.[6]

NHTSA closely reviewed each of the comments posted to the docket for this Proposal. While NHTSA is responding to the particular comments in further detail in the substantive analysis in the following sections of this final rule, at a high level, the public comments spanned a diverse array of state and local jurisdictions, regulated entities and trade associations for regulated industries, public interest groups and other nonprofit organizations, and individual members of the public. The Agency appreciates the time and effort dedicated by these parties in submitting their comments and is grateful for the diversity and depth of views, both for and against the Proposal, expressed by the commenters.

Overall, the Agency received comments spanning the entire spectrum of perspectives with respect to the Proposal. The vast majority of comments from the entities most immediately affected by the rulemaking, *i.e.,* states and local jurisdictions, strongly supported the Proposal. In particular, as explained further below, many of these comments provided tangible examples of hardships imposed

[6] Following the close of the comment period, the State of California requested a meeting to describe aspects of a public comment submitted by California, along with other states and cities. *See* State of California et al., Docket No. NHTSA–2021–0030–0403, *Comments of States and Cities Supporting Repeal of NHTSA's ''SAFE'' Part One Preemption Rule* (June 11, 2021). In this meeting, which occurred on August 26, 2021, California walked through the various sections of their comment. A docket memo posted by NHTSA to the rulemaking docket provides more information regarding this meeting. See *NHTSA,* Docket No. NHTSA–2021–0030–0450, Docket Memo, *Meeting with the State of California,* (Sept. 7, 2021).

by the SAFE I Rule and identified nuanced aspects of their affected programs that were not fully considered during the SAFE I rulemaking. Likewise, comments from entities or associations in the automotive industry, who are directly affected by motor vehicle emission regulations, largely tended to support the Proposal or offer more neutral views. With a few exceptions, most other institutional commenters strongly supported the rulemaking as well. Such commenters consisted of public interest groups, such as environmental or consumer advocacy organizations, who overwhelmingly supported the Proposal and urged a swift repeal of the SAFE I Rule for many of the same reasons expressed in the NPRM.

The Agency also received several institutional comments that expressly opposed the Proposal. While these comments are discussed in depth later in this final rule, in a general sense, these comments urged the Agency to retain the SAFE I Rule in its entirety. Many of these comments defended the substantive validity of the preemption scope announced in the SAFE I Rule, and construed NHTSA's governing authorities as delegating to the Agency the power to regulate preemption in the manner attempted in that rulemaking. Several of these comments also questioned the sufficiency of NHTSA's proposed justifications to repeal the SAFE I Rule, essentially arguing that NHTSA could not reasonably repeal a substantive position on preemption without replacing it with an alternative substantive view. While a number of individuals commented in support of the Proposal, the Agency recognizes that many individual members of the public also opposed a repeal of the SAFE I Rule.[7]

Finally, a significant portion of the comments raised, either in full or in part, issues beyond the narrow scope on which NHTSA proposed to repeal the SAFE I Rule. Such topics, which appeared in comments both supportive of and opposed to the Proposal, tended to focus on the substantive aspects of the CAFE program, such as the appropriate levels of fuel economy stringency, the effect of any particular state programs on the environment or vehicle fleets, or specific vehicle technologies, such as electrification. Likewise, as anticipated in the NPRM, many of the commenters also articulated substantive views on the appropriate scope of EPCA preemption.[8] NHTSA recognizes that many of these issues pose important societal or public policy questions and, in fact, analyzed a number of these topics in significant detail as part of its standard-setting analysis proposed in the **Federal Register** on September 3, 2021, ''Corporate Average Fuel Economy Standards for Model Years 2024–2026 Passenger Cars and Light Trucks.'' [9] Nevertheless, most of these issues do not directly speak to the proposed bases of NHTSA's repeal of the SAFE I Rule, given the very narrow scope of this rulemaking, which principally arose from a reconsideration of the discrete legal issues that underpinned the exercise of Agency authority in the SAFE I rulemaking. As such, while NHTSA greatly appreciates the efforts of commenters to submit such views and thoroughly reviewed them as part of the Agency's continuous efforts to understand broader public perspectives on NHTSA's fuel economy responsibilities, such views do not directly bear upon today's final rule.

C. Finalized Approach

Today's final rule finalizes the proposal set forth in the CAFE Preemption NPRM. As such, this final rule repeals all aspects of the SAFE I Rule, both the codified regulatory text and the accompanying pronouncements about the scope of CAFE preemption. Specifically, the final rule repeals 49 CFR Sections 531.7 (''Preemption'') and 533.7 (''Preemption''), as well as each Appendix B in 49 CFR part 531 (''APPENDIX B TO PART 531—PREEMPTION'') and Part 533 (''APPENDIX B TO PART 533—PREEMPTION''). In doing so, NHTSA's regulations will return to the same state for which they existed throughout the nearly 50-year history of the Agency's CAFE program—in which no regulation existed to purport to broadly define the scope of EPCA preemption.

In finalizing this Proposal, NHTSA concludes that it lacked authority to dictate the scope of EPCA preemption enacted in Section 32919. The plain language of Section 32919 establishes a clearly executable preemptive framework that can be applied by any reviewing court in the absence of an Agency regulation purporting to further dictate EPCA's preemptive scope. This conclusion is not simply presupposition, but as NHTSA's Proposal referenced and many commenters subsequently emphasized, the self-sufficiency of Section 32919 is a straightforward historical observation demonstrated by the provision's repeated application by Federal courts across the country—both to uphold and to preempt various state and local laws. The text of Section 32919 does not mention any role for NHTSA in codifying binding preemption requirements, nor does it state that the Agency is conferred with preemption rulemaking authority. Instead, the statute is self-executing and suffices to control the preemption analysis. The courts retain their authority to decide preemption questions; furthermore, the Agency may, consistent with law, provide interpretations of CAFE preemption questions other than by legislative rule. Thus, repeal of the SAFE I Rule is not simply appropriate, but a necessary measure to ensure that NHTSA is acting within the appropriate scope of its authority under EPCA.

In addition, today's final rule also concludes that a repeal of the SAFE I Rule is appropriate irrespective of whether NHTSA had legal authority for the SAFE I rulemaking. Through both its regulations and preambulatory language, the SAFE I Rule sweepingly preempted expansive categories of state and local motor vehicle emissions regulations. In doing so, the SAFE I Rule imposed immutable preemption requirements of general applicability, while ignoring the substantially important federalism interests affected by such prohibitions. Many of the comments from states and local jurisdictions underscored this position, identifying specific state programs affected by the SAFE I Rule that those states had previously relied on to protect their citizens from environmental hazards and to meet federal obligations, such as attainment goals for National Ambient Air Quality Standards for criteria pollutants.[10] By

[7] The vast majority of these individual commenters who opposed the rulemaking appeared to participate in an organized letter writing campaign, judging from the fully or partially verbatim overlap in language or terminology in many of those comments, and raised the same general objections to the proposed rule.

[8] *See, e.g.,* CAFE Preemption NPRM, 86 FR at 25982 n.8 (''The Agency anticipates that many stakeholders may comment, urging the Agency to go further—not mere not merely to repeal the preemption determination, but to affirmatively announce a view that State GHG and ZEV programs are not preempted under EPCA. Nevertheless, the Agency deems any such conclusions as outside the scope of this Proposal.'').

[9] NHTSA, Corporate Average Fuel Economy Standards for Model Years 2024–2026 Passenger Cars and Light Trucks, 86 FR 49602 (Sept. 3, 2021).

[10] *See, e.g.,* National Association of Clean Air Agencies, Docket No. NHTSA–2021–0030–0140 (June 10, 2021) (''For California and states that implement California's motor vehicle emissions program under Section 177 of the federal Clean Air Act, their GHG and ZEV programs are vitally important. Such programs enable long-term planning and yield critical emission reductions that will contribute significantly to states' abilities to meet their climate goals and their statutory obligations to attain and maintain the health-based

imposing categorical preemption prohibitions without regard for such considerations, the SAFE I Rule impermissibly failed to account for legally relevant factors, such as reliance interests of states and local jurisdictions in longstanding programs potentially affected by the Rule. In doing so, the SAFE I Rule precluded potential avenues for a more tailored approach that considered programs in a more particularized setting rather than prematurely overriding those federalism interests in a categorical manner.

Moreover, by purporting to preempt abstract categories of regulation, the SAFE I Rule's prohibitions were both categorical and anticipatory—largely precluding entire subjects of state regulations without analyzing important factual questions or variables, such as the particulars of state programs, their specific manners of implementation, or possible scientific developments that may affect the relevant technologies. Therefore, even if the SAFE I Rule constituted a legitimate exercise of the Agency's authority, it represented an overly broad attempt to preempt state and local laws that precluded more detailed, and therefore potentially more accurate, considerations of specific programs. As such, NHTSA considers the SAFE I Rule's categorical and anticipatory scope to express an inappropriately broad and restrictive view on EPCA preemption. Accordingly, independent from the authority question, the SAFE I Rule conflicts with the need for a more focused consideration of preemption issues and, as such, must be repealed.

Finally, as part of today's notice, NHTSA is also expressly emphasizing that language in the preambulatory statements of other rulemakings, including the SAFE I Rule, which purport to dictate the scope of EPCA preemption, should no longer be viewed as the position of the Agency.[11] Indeed, several commenters expressed a view that those statements should be naturally understood as defunct upon a formal repeal of any attendant regulatory text.[12] In any event, given the degree to which many of these statements—especially in the SAFE I Rule—employ absolute language and purport to outright prohibit certain regulations, the Agency feels that it is important to make abundantly clear that these statements should not be read out of context to suggest that they remain current views of the Agency. This ensures that parties otherwise affected by such statements are not confused about whether the admonitions and prohibitions contained in the statements, which remain published in the **Federal Register** even after the repeal of the actual regulations from the Code of Federal Regulations, continue to apply.

II. Final Rule

A. This Final Rule Is a Proper Exercise of NHTSA's Reconsideration Authority

As emphasized in the Proposal, NHTSA, like any other Federal agency, is afforded an opportunity to reconsider prior views and, when warranted, to adopt new positions. Indeed, as a matter of good governance, agencies *should* revisit their positions when appropriate, especially to ensure that their actions and regulations reflect legally sound interpretations of the agency's authority and remain consistent with the agency's views and practices.

The need for an ongoing reconsideration of prior positions applies to both reevaluations of an agency's statutory authority, as well as reassessments of policy decisions. Overwhelmingly, commenters to this Proposal did not question the general discretion of NHTSA, as a Federal agency, to reconsider either statutory or policy-based decisions. Indeed, most commenters expressly supported NHTSA's reconsideration efforts and articulated numerous reasoned justifications for the undertaking. The few commenters who opposed the reconsideration tended to focus on the adequacy of the *reasons* for the reconsideration rather than NHTSA's prerogative to conduct the reconsideration. Such objections are addressed below within the specific reconsideration basis to which they were directed. However, a small number of dissenting comments raised issues more broadly applicable to the reconsideration process.

i. The Agency's Reconsideration Authority Applies Irrespective of Any Changes in Facts or Circumstances

Several commenters contended that the Agency lacks a sufficient legal basis to withdraw the SAFE I Rule, arguing that no legal or factual circumstances changed between the issuance of the SAFE I Rule and the Proposal.[13] At the outset, it is important to be clear that the procedural question of whether an agency may reconsider a prior action is separate from whether the reconsideration is itself reasonable. We discuss the first here, while we address the second issue below in Part II.B. NHTSA does not agree that no relevant legal or factual developments occurred following the SAFE I Rule. But even before reaching this question, the Agency stresses that the governing administrative law framework does not require that any such changes occur before an agency may reconsider a prior position. A change in factual circumstances is only one amongst a host of different reasons that may cause an Agency to reconsider a prior agency action. Agencies may reconsider an issue ''for example, in response to changed factual circumstances, *or* a change in administrations.'' [14] Pure policy reconsiderations also remain sufficient grounds, with ''evolving notions'' about the appropriate balance of varying policy considerations constituting sufficient reason for a change in position.[15] This is all part of the natural and appropriate role of an agency engaging in informed rulemaking, which ''must consider varying interpretations and the wisdom of its policy on a continuing basis.'' [16]

This reconsideration exemplifies the types of reassessments for which a change in facts is not required or even particularly pertinent. As described throughout this notice, NHTSA's repeal of the SAFE I Rule is especially necessary because the Agency no longer reads EPCA as providing NHTSA the authority to dictate the scope of preemption through regulations. This is principally a narrow legal determination, which focuses on whether Congress intended to provide the requisite rulemaking authority to the Agency. Such a question does not turn upon factual circumstances, but instead depends upon a statutory construction of Section 32919. Further, as discussed below, even if the prior rule was a valid exercise of its authority, NHTSA concludes that the SAFE I Rule was overly broad and restrictive as it ignored important reliance interests and distinctions within state and local laws.

Even so, NHTSA notes that new factual developments since the SAFE I Rule's 2019 promulgation have

National Ambient Air Quality Standards (NAAQS) for criteria pollutants.'').

[11] The specific statements identified by the Agency are described further in Section II.B.iii.b. *See also infra* n.252 (listing statements appearing in rulemakings other than the SAFE I Rule).

[12] *See* State of California et al., Docket No. NHTSA–2021–0030–0403 (June 11, 2021); Center for Biological Diversity et al., Docket No. NHTSA–2021–0030–0369 (June 11, 2021).

[13] *See* National Automobile Dealers Association, Docket No. NHTSA–2021–0030 (June 10, 2021).

[14] *Nat'l Cable & Telecomms. Ass'n* v. *Brand X internet Servs.,* 545 U.S. 967, 981–82 (2005) (emphasis added).

[15] *N. Am.'s Bldg. Trades Unions* v. *Occupational Safety & Health Admin.,* 878 F.3d 271, 303 (D.C. Cir. 2017).

[16] *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 838 (1984).

occurred. Commenters stressed many of these factual updates as illustrative of the sweeping scope of the SAFE I Rule. For example, since the SAFE I Rule's promulgation, several additional states have expressed a desire to adopt future motor vehicle emissions measures under Section 177 of the Clean Air Act.[17] Moreover, many commenters stressed that every successive year, additional information and scientific data emerges regarding the climate crisis.[18] Multiple other comments emphasized that technological progress on motor vehicle emissions reduction strategies creates a dynamic regulatory landscape in which compliance paths are more complex than the static assumptions in the SAFE I Rule.[19] Thus, even though a change in facts is not necessary for NHTSA's reconsideration to occur, the Agency disagrees with several commenters who argued that no factual circumstances have changed since the SAFE I rulemaking occurred.

ii. The Agency Can Reconsider the SAFE I Rule Without the Need To Announce New Substantive Positions on EPCA Preemption

Several other commenters opposed the Proposal by arguing that any repeal of the SAFE I Rule that did not announce a new substantive position on EPCA preemption was arbitrary and capricious. These comments especially criticized aspects of the Proposal, such as footnote 8, that expressly clarified that any new substantive conclusions on EPCA preemption were ''outside the scope of this Proposal.'' [20] For instance, a joint comment submitted by a collection of entities, including the Competitive Enterprise Institute (CEI), labeled the Proposal ''the first-ever assertion of regulatory cancel culture'' because ''the NPRM declines to debate the opinions it proposes to delete.'' [21] Ultimately, these commenters suggested that NHTSA could not repudiate the views of EPCA preemption announced in the SAFE I Rule without simultaneously replacing those views with a new substantive position on preemption.

NHTSA understands that many commenters feel strongly about the important policy dynamics underlying the scope of EPCA preemption. This applies both to commenters such as CEI, who support sweeping EPCA preemption and seek to defend the substance of the SAFE I Rule's scope,[22] and to commenters who prefer NHTSA to declare expressly that EPCA preemption is inapplicable to state programs.[23] Several such comments that oppose the rulemaking argue that unless the agency announces new substantive positions on EPCA preemption, it has failed to provide a legally adequate justification for a repeal.[24]

However, by advancing directly to substantive policy questions, such comments skip a critical step in the rulemaking analysis. As an agency, NHTSA's exercise of rulemaking authority is bound by specific statutory and legal frameworks that govern not only the substantive scope of available policies, but also the manner in which such policies may be articulated.[25] Therefore, NHTSA may not proceed directly to the policy questions surrounding EPCA preemption without first carefully considering whether the manner in which its views are expressed is appropriate and permissible. In this respect, both the Proposal and final rule are based on issues that arise prior to reaching any substantive conclusions about EPCA preemption. Namely, this reconsideration principally evaluates the legal authority for NHTSA to issue legislative rules implementing Section 32919 and the overly broad form in which NHTSA promulgated those regulations. As such, this action addresses these threshold questions while establishing space for the Agency to more thoroughly consider whether, when, and how to express its views on the subsequent substantive matters, such as whether particular state and local programs are preempted. In fact, the Proposal expressly acknowledged that NHTSA continues to deliberate further about ''the scope of preemption under EPCA'' and in the future may ''announc[e] new interpretative views regarding Section 32919.'' [26] But before doing so, NHTSA must ensure that the manner in which the issues are raised—including the manner in which the Agency has spoken about them in the past—conforms to the authority delegated to the Agency by Congress and is otherwise appropriate, as discussed in Part II.B. That is the focus of this rulemaking and a principal impetus for today's repeal of the SAFE I Rule.

As described throughout this Final Rule, NHTSA has concluded that the SAFE I Rule exceeded the Agency's authority by attempting to dictate the scope of EPCA preemption through regulations. Upon such a determination, the most responsible and legally essential course of action is for the Agency to exercise its reconsideration authority to rectify the overstep. The importance of the policy interests underlying the EPCA preemption issue do not compel a different approach. Instead, they only underscore the need for NHTSA to ensure that when it attempts to speak to these notable policy issues, it only does so as properly authorized and through an appropriate scope.

Moreover, now that NHTSA has determined that the SAFE I Rule exceeded the Agency's authority for the reasons expressed in Part II.B.i. below and also impermissibly ignored important federalism interests without regard for the availability of a more circumscribed approach instead, as explained in Part II.B.ii. below, it would be problematic to delay a repeal of the

[17] *See, e.g.* Edison Electric Institute, Docket No. NHTSA–2021–0030–0396 (June 11, 2021) (''Since the finalization of SAFE I, Nevada, New Mexico, Minnesota and Virginia have announced their intent to adopt California's criteria-pollutant, GHG, and ZEV regulations. Washington, which has already adopted California's criteria-pollutant and GHG standards, has announced its intent to adopt California's ZEV standards.'').

[18] *See generally* Allergy & Asthma Network et al., Docket No. NHTSA–2021–0030–0299 (June 4, 2021).

[19] South Coast Air Quality Management District, Docket No. NHTSA–2021–0030–0446 (June 11, 2021).

[20] CAFE Preemption NPRM, 86 FR at 25982 n.8.

[21] Competitive Enterprise Institute et al., Docket No. NHTSA–2021–0030–0411 (June 11, 2021).

[22] *Id.*

[23] *See, e.g.,* Tesla, Inc. Docket No. NHTSA–2021–0030–0398 (June 11, 2021). This is not to say that all commenters advocated for the rulemaking to expand into substantive EPCA areas. In fact, a large number of commenters appeared to understand the narrow legal focus of this rulemaking, with many expressly supporting the Agency's bifurcated approach of first sorting out issues of Agency authority before grappling with substantive EPCA preemption questions. *See, e.g.,* Center for Biological Diversity et al., Docket No. NHTSA–2021–0030–0369 (June 11, 2021) (''While the substantive errors in the Rule's preemption analysis could have formed an independent ground for repeal, Commenters understand that NHTSA considers those issues to be ''outside the scope of this Proposal'' because NHTSA will not be '[r]eassessing the scope of preemption under EPCA' or 'announcing new interpretive views'' in this proceeding.' ''); Rivian, Docket No. NHTSA–2021–0030–0413 (June 11, 2021) (''Rivian agrees in the appropriateness to leave an affirmative announcement of the view that State GHG and ZEV programs are not preempted under EPCA for another rulemaking.''); National Coalition for Advanced Transportation, Docket No. NHTSA–2021–0030–0310 (June 11, 2021) (''NCAT recognizes that NHTSA is not seeking comment on substantive interpretation of EPCA preemption'').

[24] *See* American Fuel & Petrochemical Manufacturers, Docket No. NHTSA–2021–0030–0425 (June 11, 2021) (arguing that NHTSA's ''recission of the SAFE I Rule would be unlawful'' because the rulemaking ''fails to explain how ZEV mandates and GHG tailpipe standards are not 'related to' the federal CAFE standards, a foundational requirement for a regulatory reversal such as the one NHTSA is proposing here.'').

[25] *Ry. Labor Executives' Ass'n* v. *Nat'l Mediation Bd.,* 29 F.3d 655, 670 (D.C. Cir. 1994) (en banc) (stressing that ''[a]gencies owe their capacity to act to the delegation of authority, either express or implied, from the legislature'').

[26] CAFE Preemption NPRM, 86 FR at 25982 n.8.

Rule until new interpretative positions on EPCA preemption (following the appropriate process) can be formulated. Many commenters, and particularly local jurisdictions directly affected by the SAFE I Rule's preemption determination, urged a swift finalization of this rulemaking in order to resolve their federalism interests.[27] Although the Agency agrees with these commenters about the need to repeal the SAFE I Rule swiftly, NHTSA stresses that today's action is not intended to determine that any particular State or local law is or is not preempted. As evidenced by other comments' diversity and depth of views on the substance of EPCA preemption, applying Section 32919 to particular state programs or types of regulations requires a more careful and comprehensive analysis, that is attentive to the legal and factual issues presented by a particular action. As explained further in Section II.B.ii., these intricacies are best addressed through careful deliberation and attention to the factual context relevant to the respective preemption considerations. Accordingly, requiring new substantive views on EPCA preemption to accompany any repeal of the SAFE I Rule would require the Agency to either delay a repeal of the SAFE I Rule even though the Agency considers it an invalid rule or, conversely, formulate a new overly broad substantive view on EPCA preemption that risks similar overgeneralizations as exhibited in the SAFE I Rule. However, this false dichotomy is avoidable by first focusing on a repeal of the SAFE I Rule before subsequently—and separately—taking the time needed to fully consider how to best approach any nuanced substantive issues that remain, if the Agency determines that such action is necessary.

Finally, it is worth emphasizing that EPCA does not state that NHTSA *must* speak substantively on EPCA preemption. This clear reading of Section 32919 was affirmed by commenters both supportive of and opposed to the Proposal. For instance, a supportive comment submitted by the State of California, together with numerous other states and local jurisdictions, emphasized that ''even if EPCA did give NHTSA that authority [for the SAFE I Rule], the statute does not compel NHTSA to issue such rules.'' [28] Similarly, a comment from the National Automobile Dealers Association (NADA), who opposed the Proposal, echoed the sentiment that the SAFE I Rule was ''not specifically required by EPCA to be issued'' as it was ''not a necessary predicate to EPCA preemption.'' [29]

Such comments recognize, as they must, that EPCA is totally silent as to any role for NHTSA in further defining EPCA preemption. They simply disagree on what that silence means. But even construing this silence permissively, as commenters such as NADA urged,[30] whether to speak substantively about EPCA preemption is, at most, a matter of Agency discretion. In this respect, EPCA contrasts sharply with other enactments in which Congress expressly instructed NHTSA or DOT to promulgate implementing regulations about a particular subject. Examples of such enactments abound even within EPCA, such as the unambiguous instruction in Section 32902 that ''the Secretary of Transportation *shall prescribe by regulation* average fuel economy standards for automobiles manufactured by a manufacturer in that model year.'' [31] In comparison to such statutorily mandated regulations, the silence of Section 32919 cannot reasonably be read as a requirement that NHTSA promulgate any particular preemption regulations or even opine on the substance of preemption at all. Under the framework advanced by these commenters, an agency could never return to silence after speaking substantively on a topic, even if it had good reasons to do so and the statute did not require the agency to speak on the issue. This unsustainable standard would permanently erode any NHTSA discretion to remain silent under Section 32919.

Therefore, regardless of the authority question, EPCA at most only afforded NHTSA discretion to decide how or even whether to speak on matters of preemption. Thus, even if Section 32919 is construed as commenters such as NADA urge, EPCA still must be read to permit NHTSA to remain silent on EPCA preemption. This includes neither codifying regulations on preemption nor making broadly applicable statements on EPCA preemption where the Agency has valid reason not to do so. And here, as discussed in Section II.B., NHTSA has identified multiple clear grounds to repeal the SAFE I Rule. Such silence remains a viable option because, as commenters across the board recognized, the self-executing language of Section 32919 is fully capable of controlling the preemption question without the presence of Agency regulations.[32]

iii. The Narrow Scope of This Reconsideration Renders Substantive Policy Issues Raised in the Comments Outside of the Scope of This Rulemaking

The narrow legal scope of this rulemaking renders many of the substantive issues raised in the comments irrelevant to NHTSA's reconsideration and repeal of the SAFE I Rule. Comments on both sides of the spectrum—both for and against the Proposal—fall outside of this narrow scope. The Agency carefully evaluated such comments, both to identify any nuances that may yet bear upon this rulemaking and to cultivate a greater understanding of how the public views broader issues associated with the CAFE program. Nevertheless, NHTSA does not consider such issues as informing the narrow legal focus of today's repeal of the SAFE I Rule. Several categories of such comments are identified below, along with an explanation of how they fail to intersect with the specific grounds that motivated this reconsideration.

Many commenters, both supportive of the Proposal and opposed to a repeal of the SAFE I Rule, advanced their views about the proper scope of EPCA preemption and, in particular, how ''related to'' in Section 32919 should be

[27] *See* District of Columbia Department of Energy and Environment, Docket No. NHTSA–2021–0030–0412 (June 11, 2021) (''The District of Columbia calls on the NHTSA to finalize this rule proposal as expeditiously as practicable. The District and other 177 states need regulatory certainty to implement clean cars programs for the benefit of the health and welfare of our residents.''); National Coalition for Advanced Transportation, Docket No. NHTSA–2021–0030–0310 (June 11, 2021) (urging the Agency to finalize the repeal ''as promptly as possible'').

[28] State of California et al., Docket No. NHTSA–2021–0030–0403 (June 11, 2021).

[29] National Automobile Dealers Association, Docket No. NHTSA–2021–0030–0435 (June 10, 2021).

[30] *Id.*

[31] 49 U.S.C. 32902(a) (emphasis added). *See also infra.* nn.125–131.

[32] Emmett Institute on Climate Change and the Environment, Docket No. NHTSA–2021–0030–0218 (June 10, 2021) (''[w]e do not believe that such guidance—or a more formal preemption determination along those lines—is necessary in light of the self-executing nature of EPCA's preemption language, the statutory and legislative history of EPCA and its amendments, and legal precedent regarding EPCA's relationship to state and federal fuel economy standards.''); Alliance for Automotive Innovation, Docket No. NHTSA–2021–0030–0400 (June 11, 2021) (acknowledging that any offending state programs are ''automatically preempted under the terms of the statute. Federal courts can apply EPCA's preemption provision to any such law or regulation''); National Automobile Dealers Association, Docket No. NHTSA–2021–0030–0435 (June 10, 2021) (''NADA concurs with NHTSA's repeated suggestions that EPCA's express and implied preemption is self-executing. Consequently, the SAFE I Rule's regulatory language is *not* essential to effectuate EPCA's express and implied preemption of state laws governing or related to the fuel economy of new light-duty motor vehicles.'') (emphasis in original).

substantively construed. Some of these commenters expressly recognized that such views fell outside of the Proposal, but nevertheless included them in the event the Agency elected to delve into substantive issues in another context, such as an interpretation or in a subsequent action after this rulemaking.[33] Likewise, many commenters supportive of the Proposal identified what they viewed as the SAFE I Rule's erroneous legal conclusions on the scope of EPCA preemption, as part of their broader support for any action that repealed the Rule.[34] Other comments mistook the Proposal as setting forth substantive views and welcomed the new positions the Agency was assumed to have adopted.[35] Moreover, multiple comments opposing the Proposal sought to defend the SAFE I Rule on substantive grounds, labeling the original rulemaking a correct interpretation of EPCA.[36] These comments tended to focus on the meaning of ''related to'' under Section 32919 and essentially tracked the reasoning of the SAFE I Rule in construing the phrase's substantive scope.[37]

While all of these comments raise the important questions of how far EPCA's scope extends and which state programs may be affected by such a scope, as the Agency explained both in the Proposal and in today's final rule, those issues are distinct from the narrow legal considerations that factor into this rulemaking. NHTSA's statutory authority to codify standalone requirements for EPCA preemption is a separate question from whether the substance of those requirements exceeds the scope of Section 32919. Likewise, even if the Agency had authority for the SAFE I Rulemaking, it remains possible for NHTSA to have wielded this authority in an inappropriately broad or inattentive manner, irrespective of the ultimate substantive preemption scope propounded in such an action. Consequently, none of the grounds invoked in this rulemaking for a repeal of the SAFE I Rule depend upon a particular interpretation of EPCA's preemptive scope. As such, as NHTSA explained elsewhere in this notice, finalizing this rulemaking without delving into those issues presents the most responsible option, which best satisfies the need for a swift repeal of the SAFE I Rule while preserving space for an ongoing thoughtful consideration of these complex substantive issues.

In a similar vein, several comments opposing the NPRM argued that NHTSA's Proposal was inadequately justified because the proposed repeal of the SAFE I Rule was not accompanied by a detailed economic analysis, such as a regulatory impact statement. These commenters, such as the American Fuel and Petrochemical Manufacturers (AFPM), contended that NHTSA could not repeal the SAFE I Rule without ''fully analyz[ing] the impacts'' or ''examin[ing] the relevant data'' behind economic impacts from this rulemaking.[38] For example, AFPM argued that such an analysis must undertake a detailed economic estimate of a litany of considerations, including ''the foreseeable impacts'' to ''vehicle cost, jobs, low-income households, small businesses, etc.,'' as well as an evaluation of how possible programs that may be initiated by states following a repeal affect other estimates, such as electric vehicle pricing or the stringency of subsequent CAFE standards.[39] Other commenters argued similarly, insisting that a repeal of the SAFE I Rule would ''almost certainly lead to'' more stringent fuel economy standards and inflated vehicle prices, thereby eroding consumer choice.[40] Additional commenters propounding this view submitted their own voluminous impacts analyses of a repeal of the SAFE I Rule, which included submissions of material such as declarations from academics, published journal articles analyzing particular regulatory programs, and past regulatory analyses conducted by EPA and CARB regarding specific regulatory programs.[41]

To the extent commenters articulated these positions as reasons NHTSA failed to satisfy various Executive Orders, the National Environmental Policy Act (NEPA), and other broadly applicable requirements, those aspects of the arguments are addressed in Section III (Rulemaking Analyses and Notices).[42] However, insofar as those comments suggest that the absence of a detailed economic analysis inadequately justifies a repeal, NHTSA rejects such arguments as misconstruing the nature of this rulemaking.

As explained throughout this final rule, NHTSA has concluded that the SAFE I Rule was legally flawed in a manner that legally necessitates a repeal. First, as Section II.B.i. of the final rule concludes, NHTSA issued the SAFE I Rule in excess of its authority. Accordingly, the Agency believes that the only legally appropriate course of action is to repeal the SAFE I Rule in order to undo the legally invalid action. Similarly, as Section II.B.ii. of this notice explains, NHTSA also ignored significant and legally relevant factors when promulgating the SAFE I Rule. Overlooking these considerations also renders the SAFE I Rule legally invalid and in need of repeal. Each of these grounds is governed by a legal determination, such as the legal standards and questions of statutory construction applicable to an agency's delegation of authority. These principles of law dictate a repeal of the SAFE I Rule irrespective of the policy concerns or impacts asserted by such commenters, which cannot cure the legal deficits in the SAFE I Rule. Therefore, the concerns raised by such commenters do not alter either the legal frameworks or the legally necessitated outcomes described in Sections II.B.ii. and II.B.iii. of this notice.

Moreover, such commenters also fail to account for the fact that, through this repeal, NHTSA's regulations are simply returning to the status quo as it existed prior to the legally invalid action of the SAFE I Rule. Thus, in this rulemaking, NHTSA is not taking a position on

[33] *See, e.g.,* Emmett Institute on Climate Change and the Environment, Docket No. NHTSA–2021–0030–0218 (June 10, 2021) (''To the extent NHTSA believes a statement confirming EPCA's lack of preemptive effect on state vehicle GHG emission and ZEV standards would be useful and appropriate, it could issue interpretive guidance to that effect. However, we do not believe that such guidance—or a more formal preemption determination along those lines—is necessary'').

[34] *Id.*

[35] *See, e.g.,* Tesla, Inc. Docket No. NHTSA–2021–0030–0398 (June 11, 2021) (''NHTSA's proposal to clarify that EPCA should not be read to preempt state emission standards that are contemplated and authorized by the CAA is welcomed.''); Maine Department of Environmental Protection, Docket No. NHTSA–2021–0030–0249 (June 10, 2021) (''As NHTSA's Proposed Rule now acknowledges, this interpretation was flawed, for California's GHG emissions standards are not 'related to' and do not otherwise conflict with federal fuel economy standards simply because CO2 emissions correlate with fuel consumption The Department applauds this correction.'').

[36] *See, e.g.,* National Automobile Dealers Association, Docket No. NHTSA–2021–0030–0435 (June 10, 2021) (stressing that the ''the SAFE I Rule contains a well-reasoned analysis'' before outlining the substantive points in the Rule to which NADA agreed).

[37] *See* American Fuel & Petrochemical Manufacturers, Docket No. NHTSA–2021–0030–0425 (June 11, 2021) (undertaking a statutory construction analysis of ''related to'' under Section 32919). *See also* Urban Air Initiative et al., Docket No. NHTSA–2021–0030–0423 (June 11, 2021) (discussing federal jurisprudence defining the scope of the term ''related to'').

[38] American Fuel & Petrochemical Manufacturers, Docket No. NHTSA–2021–0030–0425 (June 11, 2021).

[39] *Id.*

[40] Competitive Enterprise Institute et al., Docket No. NHTSA–2021–0030–0411 (June 11, 2021).

[41] *See* Urban Air Initiative et al., Docket No. NHTSA–2021–0030–0423 (including Attachments 2–9).

[42] Likewise, many of the reasons outlined here also apply to those rulemaking analyses sections.

whether any individual program is preempted or not. And, even after this final rule, the viability of individual state or local programs and any associated policy impacts from those programs will be dependent on a host of particularized and contingent variables. In light of this, it is difficult to project, even for illustrative purposes, the incremental impacts of this regulatory action.[43]

In addition, because the Agency does not consider an analysis of those programs in the abstract or aggregate appropriate, doing so here for purposes of analyzing impacts would risk the same sort of sweeping and overly broad preemption conclusions characteristic of the SAFE I Rule. As described in Section II.B.ii., the Agency has determined that the SAFE I Rule was both far too broad and too restrictive and did not take into account a host of legally relevant considerations, such as reliance interests, the important reasons for the state and local laws it sought to preempt, and, most importantly, the actual details of those laws. Accordingly, hypothesizing about the substantive scope of EPCA preemption for purposes of a cost-benefit analysis would undermine one of the principal goals of this rulemaking, which seeks to defer assessments of programs until the times and places in which they can be more particularly and thoroughly considered. Moreover, hypothesizing as such also further diminishes the extent to which the results of a cost-benefit analysis could inform this rulemaking because those programs are more appropriately and accurately considered in more particular contexts where it is not necessary to make abstract projections or theorize about programs or technologies that may not even exist yet.

Furthermore, in this repeal, the Agency is not declaring any particular program preempted or not preempted. Instead, this repeal simply makes the point that any such preemption analysis should be undertaken more narrowly and carefully and does not seek to alter the preemption landscape already established by Section 32919. In contrast, it was the SAFE I Rule that marked a departure from the Agency's longstanding practice of refraining from issuing EPCA preemption rules. In reality, as both the Proposal and this final rule have stressed, EPCA preemption is properly governed by the self-executing statutory language of Section 32919. That language remains in place, unchanged, irrespective of this rulemaking. The courts, of course, retain their usual authority to decide matters of EPCA preemption. In turn, the Agency may also at some point offer interpretations as guidance on its views on questions of EPCA preemption, though not through the mechanism of a legislative rule. Nevertheless, the preemption framework established by the statutory language in Section 32919 continues to govern the ultimate preemption analysis.

Moreover, it is worth noting that the SAFE I Rule itself did not include a quantitative analysis of the costs or benefits that these commenters now argue should accompany its repeal, but rather only provided a ''qualitative discussion of the impacts'' of the preemption regulations it promulgated.[44] This is despite the fact that the SAFE I Rule purported to preempt many state and local programs that were already in place, which would have had significant economic effects. This provides a clear contrast to this final rule, which takes no position on whether any particular programs are preempted.

Various commenters raised other issues that are clearly outside the scope of this rulemaking. A joint comment submitted by the State of Ohio along with several other states did not explicitly support or oppose the Proposal, but simply expressed the view that by permitting California to seek a waiver, Section 209 of the Clean Air Act unconstitutionally violates the equal sovereignty doctrine by affording preferential treatment to the State of California.[45] The comment thus concludes that ''any agencies that issue such a waiver are therefore acting unconstitutionally.''[46] NHTSA need not wade into the substance of the equal sovereignty doctrine in response to this comment. This rulemaking is conducted solely by NHTSA, and any EPA adjudication of a California waiver application under Section 209 constitutes a separate, independent proceeding.[47] Repealing the SAFE I Rule merely removes the impermissible layer of regulatory preemption from NHTSA's own regulations. The broad preemption framework codified by the SAFE I Rule applied equally to all states and repealing this framework likewise refreshes the preemption analysis for the entire country. Accordingly, repealing the SAFE I Rule does not extend differential treatment to any state or local jurisdiction.

In addition, several commenters raised a variety of issues relating to the administration of the CAFE program, which do not inform the legal bases pertinent to today's repeal of the SAFE I Rule. These range from comments advocating for a particular stringency of any fuel economy standards later promulgated by NHTSA[48] to requesting a new interpretation of 49 U.S.C. 32902 in order to more expansively consider electric vehicles in the standard setting analysis.[49] While such commenters are encouraged to raise such issues in connection with future NHTSA rulemakings setting CAFE standards, this particular rulemaking does not touch on the standard setting analysis.

Finally, NHTSA received over four hundred comments from individual commenters who expressed perspectives on the Proposal. The vast majority of these comments from individuals did not speak to the particular legal issues implicated in this rulemaking, but raised broader policy issues instead. A large number of these comments expressed opposition to the rulemaking. While submitted individually, by and large, these opposition comments appeared to be form comments or part of an unspecified letter writing campaign, as they frequently employed verbatim language. Specifically, an overwhelming number of the comments started with the exact same phrase: ''California should not be deciding what kind of cars the rest of the country can buy, and here is why . . .''[50] While the reasons provided after this opening clause varied somewhat, they all pertained to substantive policy issues surrounding motor vehicle regulations rather than the narrow legal grounds necessitating a repeal of the SAFE I Rule. Frequent examples of the substantive policy concerns raised in these comments include: Skepticism towards climate change and related environmental issues; objections to vehicle electrification; concerns about consumer choice in the availability of motor vehicles; and vehicle price concerns. Most of these comments also appeared

[43] NHTSA expands on this same issue in the NEPA section of this final rule, which explains that a statutory construction analysis controls the question of whether Section 32919 delegated authority to NHTSA to promulgate express preemption regulations. This analysis, in turn, looks to the language of the statute to discern Congress' intent.

[44] CAFE Preemption NPRM, 86 FR at 51352.

[45] State of Ohio et al., Docket No. NHTSA–2021–0030–0355 (June 11, 2021).

[46] *Id.*

[47] *Supra* n.5.

[48] Consumer Reports, Docket No. NHTSA–2021–0030–0224 (June 11, 2021); Allergy & Asthma Network et al., Docket No. NHTSA–2021–0030–0299 (June 4, 2021).

[49] Rivian, Docket No. NHTSA–2021–0030–0413 (June 11, 2021).

[50] *See, e.g.,* Comment from Thomas Houghton, NHTSA–2021–0030–0028 (June 3, 2021).

directed more to a restoration of California's waiver for the Advanced Clean Cars program under the Clean Air Act, which, as both NHTSA and EPA have explained, is a separate proceeding from this rulemaking.[51] Finally, quite a few comments failed to raise any substantive policy concerns at all, but simply expressed political hostility towards a variety of subjects, especially including the State of California and the EPA.[52]

Apart from these form comments, several individual commenters expressed support for the Proposal. Their comments also focused on substantive policy issues or matters more connected to a California waiver under the Clean Air Act. Examples of such comments include expressions of hope that the Proposal would enable states to set stronger pollution control standards or beliefs that the proposed rule offered potential health-related benefits and opportunities to mitigate climate change.

Overall, the concerns expressed by these individual commenters were not about the merits of NHTSA returning to its longstanding approach to EPCA preemption, but rather about substantive issues connected to hypothetical state programs or policy goals which the commenters felt could possibly arise at some point in the future. For instance, a number of commenters suggested that a repeal of the SAFE I Rule would result in the proliferation of electric vehicles, and therefore expressed various concerns with vehicle electrification, such as an inability to satisfy unique or specific vehicle needs (*e.g.,* work functions), poor performance, an insufficient electric grid, increased costs of electric vehicles, or misgivings about battery sourcing. Other commenters expressed broader policy concerns, such as advocating for carbon energy or arguing that air quality mitigation measures are matters of personal choice that should not be subject to regulation. Such substantive policy concerns, however, are beyond the scope of this rulemaking and NHTSA therefore does not address them here.[53] This rulemaking merely entails a narrow legal focus on the proper and prudent exercise of NHTSA's authority. The Agency's final rule neither promulgates Federal standards nor revives any standards of states or local jurisdictions. In fact, this final rule does not even change the scope of EPCA preemption under Section 32919, as NHTSA has repeatedly acknowledged that the self-executing statutory language controls such a scope and remains enacted, in full and unchanged, irrespective of the SAFE I Rule or this rulemaking.

Finally, even though many of the individual commenters expressly opposed the Proposal, NHTSA notes that many of these same comments frequently invoked reasons that actually support the rationale for the rulemaking. By far the most common theme developed in the individual comments opposing the Proposal was a concern for states' rights and skepticism of any approach that imposed an overgeneralized restriction on the ability of local jurisdictions to respond to the diverse needs of their respective communities.

These commentors opposed the Proposal based on a faulty assumption that NHTSA's rulemaking proposed to delegate the authority to California to set legally binding standards on the rest of the United States.[54] Of course, neither the Proposal nor today's repeal delegates any authority to California or elsewhere. This rulemaking does not even take a substantive position on the status of any individual program of a state or local jurisdiction. Instead, repealing the SAFE I Rule merely repeals an impermissible layer of prescriptive preemption requirements, which the Agency was not authorized to promulgate, and which improperly ignore legally relevant preemption considerations. Through such a repeal, NHTSA also removes unnecessary and inappropriate restrictions on potential policy flexibility and innovation at the state and local levels as it relates to motor vehicle emissions regulations. This additional flexibility at state and local levels may even address this theme expressed in many of these individual comments, which consistently opposed measures that applied an overbroad or one-size-fits-all approach to state and local concerns.

B. NHTSA Is Finalizing Its Repeal of the SAFE I Rule in Its Entirety

After evaluating the public's input regarding the Proposal and further assessing the Agency's concerns regarding the SAFE I Rule, NHTSA is finalizing its proposed approach of repealing the SAFE I Rule in its entirety, including both the regulatory text and the other pronouncements that the Agency made in the document about EPCA preemption. The Agency concludes that this approach is both legally required and appropriate for several distinct reasons. First, as described further in Section II.B.i., the Agency lacked the authority to promulgate regulations on preemption, as the SAFE I Rule attempted to do. Second, as described in Section II.B.ii., regardless of whether NHTSA actually had authority for the SAFE I Rule, the Rule was still promulgated without regard for legally relevant and important considerations that should have informed the preemption analysis. Instead of accounting for those issues before fundamentally altering relied-upon federalism interests, the SAFE I Rule instituted a rigid and categorical preemption framework without regard for whether a narrower approach was available. Third, irrespective of a lack of authority or the Rule's overly broad scope, the SAFE I Rule still warrants repeal in order to mitigate the unnecessary complexity and potential confusion the SAFE I Rule injected into the EPCA preemption framework. By repealing this erroneous framework and refocusing the preemption analysis on the original statutory language, this final rule also provides space for the Agency to more carefully and appropriately

[51] *Supra* n.5.

[52] To the extent these commenters associated this rulemaking with the EPA's reconsideration of California's waiver under the Clean Air Act or otherwise raised vague allegations that EPA was actually controlling this rulemaking, NHTSA reiterates again that both the NPRM and final rule were issued solely by NHTSA. Unlike the SAFE I and SAFE II Rules, this is not a joint rulemaking with EPA (or any other agency). *See also supra* n.5 (explaining that the EPA is conducting a separate, independent proceeding to reconsider its portions of the SAFE I Rule).

[53] This also applies to comments filed by institutions or entities which based opposition or support for the Proposal on substantive policy grounds. *See, e.g.,* Sierra Club Massachusetts, Docket No. NHTSA–2021–0030–0326 (June 11, 2021) (raising generalized climate concerns); Allergy & Asthma Network et al., Docket No. NHTSA–2021–0030–0299 (June 4, 2021) (raising generalized health concerns arising from the climate crisis); The particular substance of any state or local policy does not control this repeal. Likewise, a repeal of the SAFE I Rule takes no position on how particular technologies may bear upon an EPCA preemption analysis. As such, this rulemaking is technologically neutral and does not seek to promote or discourage any specific vehicle technologies or emissions reductions strategies. Comments that endorse or criticize particular technologies, which were especially concerned with vehicle electrification, do not factor into the Agency's narrow legal determination in this repeal. *See, e.g.,* American Fuel & Petrochemical Manufacturers, Docket No. NHTSA–2021–0030–0425 (June 11, 2021) (''oppos[ing] technology-specific mandates, including zero emission vehicle (ZEV) mandates'' by arguing that they ''interfere with consumers' choices and are contrary to law''); *See also* Zero Emission Transportation Association, Docket No. NHTSA–2021–0030–0397 (June 11, 2021) (supporting policies that ''increase the pace of zero emission vehicle deployment that are critical to decarbonizing the transportation sector'').

[54] *See, e.g.,* Mark Franck, Docket No. NHTSA–2021–0030–0043 (June 3, 2021) (''California should not be deciding what kind of cars the rest of the country can buy. This damaging new rule, would allow California to make special regulations that the rest of us would be required to follow.'').

incorporate those considerations into any future action that may become necessary with respect to EPCA preemption.

In all of these matters, the Agency remains mindful that EPCA does not require NHTSA to speak substantively on EPCA preemption, and certainly not through the promulgation of legislative rules. Under the unambiguous language of EPCA, the Agency could indefinitely remain silent as to Section 32919 without running afoul of any congressional directive or statutory mandate. As such, even if the SAFE I Rule's supporters have policy preferences for wanting the Rule to remain, there is indisputably no statutory requirement for the Rule. Thus, upon reconsideration, NHTSA concludes that a rule of this kind, which suffers from legal deficiencies and was imprudent for the Agency to issue, is particularly appropriate for repeal.

i. NHTSA Is Finalizing Its Proposal To Repeal the SAFE I Rule in Full Due to a Lack of Authority for the Original Rulemaking

a. Section 32919 Did Not Authorize NHTSA To Dictate Preemption in the Manner Attempted by the SAFE I Rule

NHTSA concludes that a repeal of the SAFE I Rule is legally required because the Agency lacked the requisite authority to codify the standalone regulations promulgated by the SAFE I Rule. The Agency maintains the Proposal's view that in promulgating the SAFE I Rule, NHTSA attempted to exercise a legislative rulemaking function by establishing binding, express preemption requirements, which sought to control, rather than advise, the public (including states and local jurisdictions). In order to set these regulatory mandates, Congress would have had to first provide authority to NHTSA to act in such a manner. However, the Agency has determined that Congress did not intend for Section 32919 to provide NHTSA authority to institute additional express preemption terms, or to codify the scope of EPCA preemption through legislative rulemaking.

1. The SAFE I Rule Codified Legislative Rules, Which Sought To Impose Standalone Preemption Requirements

Before describing the limitations on NHTSA's authority, the Agency first confirms the Proposal's understanding of the SAFE I Rule as codifying legislative rules, which sought to institute binding preemption requirements. NHTSA recognizes that although numerous commenters agreed with the Proposal on this issue, several commenters opposing the Proposal contested either the legislative status of the SAFE I Rule or whether the distinction even matters for this reconsideration. To be clear, NHTSA considers a repeal of the SAFE I Rule both appropriate and necessary for the reasons described throughout this final rule, irrespective of whether one considers the Rule to be legislative, interpretative, or any other form of agency statement. Nevertheless, NHTSA still views the SAFE I Rule as displaying the hallmarks of a legislative regulatory action. As such, the Agency starts the authority discussion with this issue.

In this respect, the Agency distinguishes between a legislative rule, ''which is a rule that is intended to have and does have the force of law,'' and an interpretative rule, which ''does not have the force of law and is not binding on anyone.'' [55] For this reason, legal scholars have often noted that while interpretative rules may provide guidance to the public or ''persuad[e a] court that the agency's interpretation is correct,'' [56] they ultimately lack a binding effect, serving only to ''advise the public.'' [57] As such, an interpretative rule ''does not contain new substance of its own'' but is simply a conduit for understanding a pre-existing obligation already established by the statute under interpretation.[58] In contrast, legislative rules have long been understood as imposing binding obligations that ''affect[ ] individual rights and obligations.'' [59] Further, ''the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes.'' [60] Consequently, for NHTSA to have validly promulgated legislative rules in the SAFE I Rule, Congress must have first provided the authority to the agency to do so.

Within this backdrop, NHTSA views the SAFE I Rule as clearly intending to establish binding preemption requirements, which affirmatively prohibited programs of states and local jurisdictions. As described further below, both the regulatory text and the manner in which NHTSA contemporaneously described its rulemaking lead to the conclusion that the SAFE I Rule was not an effort to inform, but an effort to issue binding, prescriptive requirements with the force and effect of law. This conclusion is supported by multiple facets of the rulemaking, many of which were illustrated through the comments.

Several commenters to the Proposal disagreed that the SAFE I Rule was a legislative rule or that the distinction between a legislative and interpretive rule mattered. Although the Agency responds more specifically to such detailed concerns below, NHTSA nevertheless considers the legislative status of the SAFE I Rule ultimately a straightforward outgrowth of the regulatory background and applicable law. While courts and legal scholars have set forth numerous multi-part tests or thresholds for trying to find the demarcation point between interpretative and legislative rules, they all overwhelmingly seek to answer a question much different, and frequently more complicated, than that presented in this rulemaking. In the typical fact pattern, encountered by many courts, an agency seeks to characterize its own action as interpretative and valid absent the undertaking of notice-and-comment procedures, while challengers (often the regulated entities most affected by the action) argue that the rule alters their substantive obligations and necessitates notice-and-comment procedures before promulgation.[61] As such, these multifaceted judicial doctrines seek to aid a reviewing court in reconciling the contradictory positions between the regulators and the regulated, in order to accurately understand how extensively the agency's action actually attempted to affect the rights and obligations of the regulated parties.

None of these circumstances apply to the SAFE I Rule or this Proposal. In the Proposal, NHTSA, as the agency that promulgated the regulations in question in the SAFE I Rule (after notice-and-comment), expressed its *own* concern that it had issued legislative rules in excess of its authority, and acknowledged that the rules attempted

[55] *Nat'l Latino Media Coal.* v. *F.C.C.,* 816 F.2d 785, 787–88 (D.C. Cir. 1987) (explaining further that ''A valid legislative rule is binding upon all persons, and on the courts, to the same extent as a congressional statute. When Congress delegates rulemaking authority to an agency, and the agency adopts legislative rules, the agency stands in the place of Congress and makes law.'').

[56] *See* Richard J. Pierce, Jr. & Kristin E. Hickman, Administrative Law Treatise § 4.5 (6th Edition, 2020–1 Cum. Supp.) (''The agency's interpretative rule serves only the function of potentially persuading the court that the agency's interpretation is correct . . . Correspondingly, members of the public may choose for practical reasons to comply with an interpretative rule.'').

[57] *See* Attorney General's Manual on the Administrative Procedure Act (1947) at 30 n.3.

[58] *Nat'l Latino Media Coal.,* 816 F.2d at 788.

[59] *See Morton* v. *Ruiz,* 415 U.S. 199, 232 (1974).

[60] *See Chrysler Corp.* v. *Brown,* 441 U.S. 281, 302 (1979).

[61] *See, e.g., Hoctor* v. *U.S. Dep't of Agric.,* 82 F.3d 165 (7th Cir. 1996).

to impose substantive restrictions on regulated entities—namely, states and local jurisdictions.[62] In turn, the state and local governments that submitted comments overwhelmingly agreed with the Agency's characterization of its own rule. This sentiment was exemplified by a comment from California's South Coast Air Quality Management District, which directly expressed that ''[t]he Preemption Rule has every indicium of being a legislative rule, which purported to change the legal rights and obligations of states by its action.''[63] As described in greater detail in Section II.B.ii. of this final rule, these commenters provided tangible examples of actual hardships those states feared would ensue from the extent to which the SAFE I Rule disrupted their state regulatory agendas and curtailed their previously understood federalism rights. These concerns make clear that, by and large, states and local jurisdictions considered the SAFE I Rule as more than simply interpretative guidance on an EPCA preemption restriction that already applied to them, but as a new regulatory measure that would serve to invalidate existing state programs and ones those entities hoped to formulate in the future.[64]

This is an understandable expectation, as both NHTSA and EPA also contemporaneously treated the SAFE I Rule as binding and effectuating change. The SAFE I Rule even expressly described the rulemaking action as ''*effectuating* Congress's goal.''[65] Similarly, commenters emphasizing this point also referenced language from the final rule preamble of the SAFE I Rule, in which the Agencies recognized that '' 'certain States may need to work with EPA to revise their [State Implementation Plans] in light of this final action'' to remove purportedly preempted standards.[66] In the SAFE I joint agency action, EPA also characterized NHTSA's preemption regulations as determinative, noting that ''in light of NHTSA's determinations'' on EPCA preemption, EPA's grant of a waiver for ''California's program was invalid, null, and void.''[67] These characterizations help to demonstrate that the regulated community and the public could reasonably have expected that NHTSA's SAFE I Rule regulations presented mandatory and legally effective requirements.

This view was echoed by many other commenters who supported this Proposal.[68] Even commenters who opposed the current Proposal and argued that the SAFE I Rule was merely interpretative (or contended the distinction failed to matter), still treated the SAFE I Rule as a regulatory linchpin that was critical to keeping states and local jurisdictions from pursuing regulatory programs that they would otherwise undertake. For example, one commenter likened the repeal of the SAFE I Rule to a ''dereliction'' of NHTSA's duty, akin to permitting states to run amok in ''lawlessness'' in the absence of regulations and removing the sole bulwark to ''California's impending balkanization,'' all the while insisting that the ''[t]he One National Program rules do not satisfy the intransitivity test for legislative rules'' because their restrictions were present all along in Section 32919.[69] This concern, though, would only be valid if the SAFE I Rule were binding and not a mere interpretation. Thus, it becomes clear that, ultimately, all commenters—both supportive of and opposed to the Proposal—treat the SAFE I Rule as a sweeping measure, which was largely expected to bind regulated entities. In other words, as a legislative rule.

The SAFE I Rule, thus, was widely viewed as establishing new legal restrictions intended to broadly alter the pre-existing EPCA preemption landscape. As described in the Proposal, in the SAFE I Rule, NHTSA codified four provisions in the CFR, each of which purported to directly regulate the scope of preemption under EPCA. Specifically, NHTSA promulgated 49 CFR 531.7 and 533.7, both of which were nearly verbatim codifications of the statutory text, and an identical appendix B to both Parts 531 and 533, which included a description of certain state regulations also described as preempted. None of these provisions instituted any new compliance or enforcement standards relating to NHTSA's CAFE program. Instead, the provisions, by their own terms, solely sought to codify into NHTSA's regulations a binding framework to govern the scope of EPCA preemption.

As both the Proposal and many commenters pointed out, the imperative and mandatory language of the SAFE I Rule illustrates the degree to which the SAFE I Rule imposed demands upon regulated entities (and expected compliance) rather than helpfully advised them of a possible construction of pre-existing statutory language. As the Preamble to the SAFE I Final Rule described, these provisions sought to ''ma[ke] explicit that state programs to limit or prohibit tailpipe GHG emissions or establish ZEV mandates are preempted.''[70] In announcing the SAFE I Rule, NHTSA repeatedly described the final rules in terms that appeared to confer upon them legally binding connotations. For instance, the Agency noted that through the final rule, ''NHTSA intends to assert preemption''[71] and characterized the regulations as ''implementing''[72] a preemption requirement. Subpart ''a'' of each appendix B to parts 531 and 533 even labels the regulatory text as ''Express Preemption'' provisions, before proceeding to categorically assert, in mandatory terms, what types of state laws were preempted.[73]

A few commenters sought to diminish the importance of such mandatory language, contending, for instance, that ''nothing'' would have practically changed had the Agency employed more permissive or advisory language in the SAFE I Rule instead of the imperative language used throughout both the codified text and preamble.[74] This argument's supposition is undermined by the numerous comments

[62] CAFE Preemption NPRM, 86 FR at 25985 (''The Agency has tentatively determined that these regulations are legislative rules, which seek to preempt state regulations in more specific terms than the express preemption provision already present in EPCA.'').

[63] South Coast Air Quality Management District, Docket No. NHTSA–2021–0030–0446 (June 11, 2021).

[64] State of California et al., Docket No. NHTSA–2021–0030–0403 (describing the SAFE I Rule's disruption of state programs and reliance interests in established regulatory approaches).

[65] NHTSA, EPA, Withdrawal of Waiver; Final Rule, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, Final Rule, 84 FR 51310, 51316 (Sept. 27, 2019) (emphasis added).

[66] South Coast Air Quality Management District, Docket No. NHTSA–2021–0030–0446 (June 11, 2021) (quoting NHTSA, EPA, Withdrawal of Waiver; Final Rule, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, Final Rule, 84 FR 51310, 51324 (Sept. 27, 2019)).

[67] NHTSA, EPA, Withdrawal of Waiver; Final Rule, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, Final Rule, 84 FR 51310, 51356 (Sept. 27, 2019).

[68] *See, e.g.,* Center for Biological Diversity et al., Docket No. NHTSA–2021–0030–0369 (June 11, 2021).

[69] Urban Air Initiative et al., Docket No. NHTSA–2021–0030–0423 (June 11, 2021).

[70] NHTSA, EPA, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, Final Rule, 84 FR 51310 (Sept. 27, 2019).

[71] *Id.* at 51317.

[72] *Id.* at 51318.

[73] *See, e.g.,* 49 CFR part 533, app. B(a)(2) (''As a law or regulation of a State or a political subdivision of a State related to fuel economy standards, any state law or regulation regulating or prohibiting tailpipe carbon dioxide emissions from automobiles is expressly preempted under 49 U.S.C. 32919.'').

[74] Urban Air Initiative et al., Docket No. NHTSA–2021–0030–0423 (June 11, 2021) (rhetorically asking ''If the Agency had done this, what would change in the real world compared to what the Agency actually did? In a word, nothing.'').

from states and local jurisdictions—the entities to whom such language was primarily directed—who consistently made clear that they understood the Rule's regulations as constricting their activities rather than merely advising how Section 32919 may be applied at some indeterminate point in the future. Moreover, the Agency's own statements in the SAFE I Rule disprove this argument, as they reveal a definitive expectation that states would curb their actions in order to meet the newly demanded scope of preemption.[75]

More fundamentally though, discounting the importance of the Agency's own language in the precise rulemaking record in question too narrowly focuses the legislative rule inquiry. Even the cases cited by opposing commenters on this issue, such as *American Mining Congress* v. *Mine Safety & Health Administration,* expressly recognized that all of the avenues and tests for distinguishing between legislative and interpretative rules are ultimately just different ways of asking whether ''the agency intended to exercise'' a delegated legislative power to promulgate rules that impose binding obligations with ''legal effect.'' [76] As noted above, this inquiry is much more straightforward in a situation, such as here, where the agency itself believes that this is the intent of the rule and undertook the notice-and-comment procedures required under the Administrative Procedure Act (APA) to issue legally binding regulations, without in any way implying that those steps were optional. For this reason, *American Mining Congress* underscored that despite any of the more complicated analyses that may apply when an agency disagrees on a rule's legislative status, the entire question is resolved if in the rulemaking the agency simply ''choose[s] explicitly to invoke its general legislating authority.'' [77] In such a case, the rule should be ''presumably treat[ed] . . . as an attempted exercise of legislative power.'' [78]

Here, the SAFE I Rule clearly—and explicitly—expressed an understanding that the new rules created legal obligations that would bind states and local jurisdictions, as described above. Moreover, even the mechanics of the SAFE I Rule's promulgation demonstrate NHTSA's awareness that it was codifying legislative rules that instituted legal requirements. Commenters defending the SAFE I Rule stressed that the rulemaking undertook all of the procedural steps required by the APA for a legislative (but not an interpretative) rule.[79] This procedural regularity only underscores the SAFE I Rule's intended legislative function, as it illustrates the lengths the Agency went to ensure that the regulations codified by the SAFE I Rule were procedurally defensible and binding.[80] Moreover, the SAFE I Rule was codified into NHTSA's own regulations in the Code of Federal Regulations (CFR)—a step that courts, including *American Mining Congress,* have often considered helpful in understanding the Agency's intent.[81] The Agency also does not view the requirements in the Appendices as somehow procedurally cured or automatically interpretations simply because they appear in appendices rather than separately numbered regulations. It is not uncommon for agencies, including NHTSA, to include regulatory requirements in appendices.[82] The appendices here continued that approach, with the facial language of the appendices codified in the CFR continuously invoking the same binding language described throughout this final rule.

Finally, a joint comment submitted by the Urban Air Initiative, among others, raised an issue that highlights one of the most telling aspects of the SAFE I Rule's legislative character.[83] Specifically, after arguing the Rule did not satisfy governing tests for legislative rules, the comment reached the ultimate conclusion that the legislative versus interpretative distinction was irrelevant to the SAFE I Rule's viability. The comment contended that, either way, the SAFE I Rule was a valid outgrowth of NHTSA's interpretative authority in administering EPCA and the CAFE program. To reach this conclusion, the comment focused at length on the concept of the ''force of law'' and the intransitivity test for legislative rulemaking, stressing that the SAFE I Rule embodied NHTSA's interpretative authority because it simply defined a pre-existing and already enforceable obligation set by Section 32919. And, in that sense, even if the SAFE I Rule's interpretation was binding, such a result was permissible as long as the APA's notice and comment procedures were followed. At least one other comment similarly remarked that whether the SAFE I Rule is legislative or interpretative ''may not make much of a difference as a practical matter.'' [84] The theme in such comments is a baseline assumption that the SAFE I Rule did not ''itself impose[ ] federal regulatory preemption'' because, they stress, Section 32919 already imposed a self-executing preemption requirement.[85]

Ultimately, the Agency believes such comments erroneously comingled the substantive question about the scope of EPCA's preemption requirements with the unrelated question of whether the SAFE I Rule's regulations sought to codify prescriptive requirements that implemented Section 32919 in a legislative manner. The Urban Air Initiative's joint comment characterized these questions as one and the same, arguing that as long as the substance of Section 32919 supported the preemption requirements promulgated in the SAFE I Rule, the legislative versus interpretative distinction was ''irrelevant'' because either way NHTSA was simply elucidating requirements that already existed under EPCA.[86]

[75] *See supra* nn.66–67.

[76] 995 F.2d 1106, 1109 (D.C. Cir. 1993) (''Our own decisions have often used similar language, inquiring whether the disputed rule has 'the force of law'. We have said that a rule has such force only if Congress has delegated legislative power to the agency and if the agency intended to exercise that power in promulgating the rule.'') (internal citations omitted).

[77] *Id.* at 1111.

[78] *Id.*

[79] *See, e.g.,* National Automobile Dealers Association, Docket No. NHTSA–2021–0030–0435 (June 10, 2021) (''the regulatory language set out in the SAFE I Rule was adopted in full compliance with all applicable procedural requirements.'').

[80] *See Long Island Care at Home, Ltd.* v. *Coke,* 551 U.S. 158, 173 (2007) (describing how an agency's use of ''full notice-and-comment rulemaking procedures'' suggested the agency intended to promulgate a legislative rule). To be clear, the mere fact that an Agency requests comment on an action before finalizing it is not itself dispositive evidence that an action is a legislative rule, as there are many strong policy reasons for agencies to seek public input on documents beyond when they are expressly required to do so by statute. However, in those instances, the agency will generally make clear that the document at issue is an interpretation, policy statement, or other sort of guidance document, which stands in significant contrast to the approach taken in the SAFE I rulemaking.

[81] *Am. Min. Cong.,* 995 F.2dat 1109 (''an agency seems likely to have intended a rule to be legislative if it has the rule published in the Code of Federal Regulations''). NHTSA recognizes that, as at least one commenter pointed out, some subsequent cases have deemed a rule interpretative even if published in the CFR. *See, e.g., Health Ins. Ass'n of Am., Inc.* v. *Shalala,* 23 F.3d 412, 423 (D.C. Cir. 1994). While such cases may indicate that a CFR publication is not dispositive of the issue, they do not eliminate the relevance of this step as a helpful piece of the larger puzzle of identifying the agency's intent to codify binding regulations.

[82] *See, e.g.,* 49 CFR part 564, Appendices A–B (listing information required to be submitted to the Agency regarding certain replaceable light sources in motor vehicles).

[83] Urban Air Initiative et al., Docket No. NHTSA–2021–0030–0423 (June 11, 2021).

[84] National Automobile Dealers Association, Docket No. NHTSA–2021–0030–0435 (June 10, 2021).

[85] *See id.*

[86] *See* Urban Air Initiative et al., Docket No. NHTSA–2021–0030–0423 (June 11, 2021).

However, blending the substance and form in this way ignores a longstanding recognition that whether legislative rules validly prescribe conduct in a binding way is a distinct issue from whether the requirements those rules impose are consistent with either the underlying statute or regulation.

Rather than comparing the substantive scope of the underlying statute and the agency's subsequent action, the legislative rule inquiry instead looks to the degree to which the standard announced by the agency went ''beyond a process reasonably described as interpretation'' by turning the original statutory standard into a rigid threshold that prescribed specific conduct.[87] In this sense, an agency performs a ''legislative function'' by applying a ''value judgement[ ]'' to a broader statutory framework and turning that judgment into a static requirement, which imposes a rigid threshold for compliance.[88] In such situations, the rule announced by the agency is legislative in that it forms a standalone requirement, which is no longer tied ''to the animating standard'' of the statute, but ''stand[s] free of the standard'' as it is ''self-contained'' and ''unbending.''[89] Examples of these types of legislative rules span from a set of investment conditions fashioned from a general statutory standard of ''reasonable costs''[90] to an agency's mathematical analysis that turned a statutory standard into a requirement that a fence meet specific dimensions.[91] While the nature or type of rule resulting from the legislative undertaking may vary, the focus of the inquiry is on the transformation of a statutory standard into a set of specifically enumerated rules that prescribe conduct.

Importantly, this legislative rule inquiry is wholly distinct from the question about whether the legislative rules would be a permissible reading of the underlying statute or regulation. In fact, courts conducting these analyses often expressly make clear that the legislative rule determination does not require them to reach the question of whether those rules would have been subsumed within the respective scopes of the statutes or any other existing regulations that the agencies had already promulgated. For instance, through this legislative rule inquiry ''[w]e may assume, without deciding, that the [requirements] are an extension'' of the statute and ''consistent'' with existing regulatory provisions.[92] Even so, ''neither assumption leads to the conclusion that the [requirements] represent an interpretation.''[93] Instead, what matters is whether the agency performs merely an act of interpretation or instead operates in an essentially legislative capacity by crystallizing a broader statutory standard into specific prescriptive requirements.

Applying this same framework, even assuming for purposes of discussion (like those courts) that the SAFE I Rule's regulations imposed a substantive obligation that was consistent with the ''related to'' standard in Section 32919, the regulations still undeniably prescribed conduct in a way that was legislative rather than interpretative. Specifically, the SAFE I Rule's regulations turned the baseline standard of Section 32919, ''related to,'' into an entire list of specifically enumerated conduct that created a prescriptive threshold for EPCA preemption.

Under Section 32919, ''a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under [Chapter 329].''[94] This statutory framework contains a general standard by which to evaluate the application of EPCA preemption: ''related to.'' In the SAFE I Rule, NHTSA applied a ''value judgment''[95] to this statutory standard by undertaking what the Rule called a ''scientific'' and ''mathematical'' evaluation of fuel economy and emissions concepts.[96] Through this endeavor, the SAFE I Rule fashioned a set of highly prescriptive requirements that precisely and rigidly dictated when a state or local jurisdiction's program ''related to'' fuel economy standards for purposes of EPCA. For the question of whether the rule was legislative or interpretive, it is wholly irrelevant to determine whether those prescriptive requirements were reasonable understandings of the ''related to'' statutory standard. All that matters for the legislative rule analysis is that, once codified, the regulations from the SAFE I Rule served as standalone standards for EPCA preemption. The SAFE I Rule extrapolated from the original statutory standard and articulated express prohibitions which, once codified, were intended to and capable of fully controlling the preemption analysis in lieu of the original statutory language.[97]

For example, Appendix B to Parts 531 and 533 expressly declares the preemption of ''any law or regulation of a State or a political subdivision of a State'' *solely* based on the fact that the program in question ''ha[s] the direct or substantial effect of regulating or prohibiting tailpipe carbon dioxide emissions from automobiles.''[98] A similar standard is repeated multiple times in the SAFE I Rule's regulations, with subsection (a)(E)(2) also flatly preempting ''any law or regulation'' that ''regulates or prohibits tailpipe carbon dioxide emissions automobiles,''[99] and subsection (b) codifying identical categorical thresholds for ''implied preemption.''[100] These categorical thresholds represent NHTSA's ''scientific'' and ''mathematical'' judgment in the SAFE I Rule as to how EPCA's animating ''related to'' standard would look as a prescriptive requirement. But in the SAFE I Rule, NHTSA went beyond just providing guidance about how NHTSA's views on the subject should inform a state or local jurisdiction who wished to understand how their program might fit within EPCA's ''related to'' standard. Instead, NHTSA announced those positions in the form of regulations of general applicability that formed their own regulatory standards. These new regulations were ''self-contained'' and ''unbending'' in that any programs that satisfied the strict regulatory text were now labeled as conclusively preempted by NHTSA. And, this approach prevented a more careful analysis of whether it is possible that any state or local standard that met the static preemption threshold imposed by these regulations may not actually ''relate to'' fuel economy for any particular reason (such as perhaps the fact-specific variables foreclosed from consideration as described below in Section II.B.ii.). In this sense, once in place, the SAFE I Rule's regulations were intended to functionally replace the EPCA preemption language in any analysis of whether a particular program was preempted, without a need to reference

[87] *See Hoctor* v. *U.S. Dep't of Agric.,* 82 F.3d 165, 170 (7th Cir. 1996).

[88] *Id.*

[89] *Id.* at 171.

[90] *See Cath. Health Initiatives* v. *Sebelius,* 617 F.3d 490, 496 (D.C. Cir. 2010).

[91] *See generally Hoctor,* 82 F.3d 165.

[92] *Id.*

[93] *Id.*

[94] 49 U.S.C. 32919(a).

[95] *Hoctor,* 82 F.3d at 170.

[96] NHTSA, EPA, Withdrawal of Waiver; Final Rule, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, Final Rule, 84 FR 51310, 51319–20 (Sept. 27, 2019) (''The foundational factual analysis involves the scientific relationship between automobile fuel economy and automobile tailpipe emissions of carbon dioxide. NHTSA discussed this scientific relationship in detail.'').

[97] *See* 49 CFR part 531, Appendix B(a)(E)(3).

[98] *Id.*

[99] 49 CFR 531.7(a)(E)(2).

[100] 49 CFR 531.7(b).

the original statutory text or underlying caselaw.[101] The SAFE I Rule even acknowledges the standalone nature of the new regulations, explaining that the codified ''regulations are *operable* without regard to any specific Federal standards and requirements . . . or other parts of the Code of Federal Regulations.'' [102]

While Section II.B.ii. below explains how this inflexible standard inappropriately precludes individualized considerations, the self-contained nature of the standard also demonstrates how the SAFE I Rule's regulations operate as prohibitions that turn a broader statutory standard into a set of rules that states and local jurisdictions must follow. This process of fashioning a set of specific and prescriptive requirements out of an underlying statutory standard involves a legislative function of the agency and the rules that emerged from this process are legislative in nature. And the law is clear that an agency may prescribe conduct and issue such legislative rules only if provided the authority to do so by Congress.[103] EPCA provides NHTSA with no such authority.

2. EPCA Did Not Authorize NHTSA To Expressly Establish New EPCA Preemption Requirements

Once the SAFE I Rule's regulations are properly understood as seeking to impose binding legal requirements, it becomes clear that the Rule is premised on the need for NHTSA to possess the requisite authority to validly set such mandates. The Proposal generated a number of comments on this authority issue. A large number of those comments agreed with the Proposal's concerns about a lack of authority for the rulemaking, while several commenters defended the legitimacy of the Rule. But while these comments may have disagreed on the existence of authority or the extent to which NHTSA's authorities extended, they did not generally dispute the Proposal's recognition of the fundamental principle that an agency must possess authority to issue legislative rules.

As the Proposal explained, the regulatory authority of federal agencies extends only insofar as Congress permits.[104] Consequently, an agency ''may act only when and how Congress lets [it].'' [105] These restrictions extend to all aspects of an agency's regulatory activity—including a rulemaking and ultimately derive from Congress.[106] As such, the matters upon which an agency may promulgate rules imbued with the force and effect of law depend upon the extent to which the Agency has the appropriate statutory authority.[107]

Ultimately, as the Proposal expressed, since an agency lacks plenary authority, the delegation of one power to an agency does not necessarily include other powers, even if they are related.[108] This applies even when the authority is analogous. For instance, the D.C. Circuit has rejected an agency's argument ''that it possesses plenary authority,'' holding instead ''that the fact that the Board is empowered'' in a particular circumstance does not ''mean[ ] the Board therefore enjoys such power in every instance'' in which a similar question arises.[109] Accordingly, construing an agency's authority requires a close examination of the precise power delegated by Congress and how such authority may differ, even if slightly, from other authority that Congress may reserve.

The need for sufficient authority does not fade when an agency seeks to promulgate regulations expressly dictating preemption. In fact, as the Proposal expressed, the legitimacy of an agency's exercise of preemption power through legislative rulemaking is principally a question of the extent of authority delegated to the agency. As such, ''in a situation where state law is claimed to be pre-empted by Federal regulation, a narrow focus on Congress' intent to supersede state law [is] misdirected.'' [110] Instead, when considering an agency's preemptive authority, ''the inquiry becomes whether the federal agency has properly exercised its own delegated authority rather than simply whether Congress has properly exercised the legislative power.'' [111] An agency must draw preemption authority from definitive sources, as the governing framework ''does not create preemption authority out of thin air.'' [112] As the Supreme Court has made clear:

> a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority. This is true for at least two reasons. First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency.[113]

In response to the Proposal, many commenters repeatedly expressed a concern that NHTSA lacked the authority for the SAFE I Rule.[114] In most cases, these comments echoed rationales expressed in the Proposal for why such authority was lacking.[115] Accordingly,

[101] NHTSA stresses that it is not necessary to substantively determine whether ''related to'' could be properly interpreted to include these concepts in order to reach this point, nor does the Agency make such a determination here. What matters is that, once codified, the regulation now forms the operative standard, which purports to be legally binding and capable of standalone application. In that sense, the regulation functions as a legislative rule, which requires legislative rulemaking authority to promulgate, no matter how proper or improper the substantive content of the rule may be.

[102] NHTSA, EPA, Withdrawal of Waiver; Final Rule, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, Final Rule, 84 FR 51310, 51315 (Sept. 27, 2019) (explaining how the SAFE I Rule was a standalone rulemaking action that did not need to accompany a CAFE standards rulemaking) (emphasis added).

[103] *See, e.g., Louisiana Pub. Serv. Comm'n* v. *F.C.C.,* 476 U.S. 355, 374 (1986).

[104] *Ry. Labor Executives' Ass'n* v. *Nat'l Mediation Bd.,* 29 F.3d 655, 670 (D.C. Cir. 1994) (en banc) (stressing that ''[a]gencies owe their capacity to act to the delegation of authority, either express or implied, from the legislature'').

[105] *Cent. United Life Ins. Co.* v. *Burwell,* 827 F.3d 70, 73 (D.C. Cir. 2016).

[106] *Id.*

[107] *See, e.g., Adams Fruit Co.* v. *Barrett,* 494 U.S. 638, 650 (1990) (determining that a Department of Labor regulation exceeded the scope of authority delegated by a statute the agency administered).

[108] *Ry. Labor Executives' Ass'n.,* 29 F.3d at 670 (en banc).

[109] *Id.*

[110] *City of New York* v. *F.C.C.,* 486 U.S. 57, 64 (1988).

[111] *Id.*

[112] *See, e.g., Mozilla Corp.* v. *FCC,* 940 F.3d 1, 78 (D.C. Cir. 2019) (determining that neither express nor ancillary authority nor other doctrines, such as the impossibility exception, could justify the FCC's assertion of preemption authority for a particular action).

[113] *Louisiana Pub. Serv. Comm'n,* 476 U.S. at 374.

[114] Center for Biological Diversity et al., Docket No. NHTSA–2021–0030–0369 (June 11, 2021); State of California et al., Docket No. NHTSA–2021–0030–0403 (June 11, 2021); South Coast Air Quality Management District, Docket No. NHTSA–2021–0030–0446; National Association of Clean Air Agencies (NACAA), Docket No. NHTSA–2021–0030–0140 (June 10, 2021); Maine Department of Environmental Protection, Docket No. NHTSA–2021–0030–0249 (June 10, 2021); Tesla, Inc. Docket No. NHTSA–2021–0030–0398 (June 11, 2021); Nevada Division of Environmental Protection, Docket No. NHTSA–2021–0030–0362 (June 11, 2021).

[115] A few comments go further and suggest that NHTSA not only lacks legislative authority with respect to EPCA preemption, but interpretative authority as well. *See, e.g.,* Northeast States for Coordinated Air Use Management, Docket No. NHTSA–2021–0030–0300 (June 11, 2021) (noting that ''the agency lacks statutory authority to define the scope of EPCA preemption through legislative *or interpretative rules*'') (emphasis added). In response, NHTSA stresses that it continues to believe that the Agency may offer interpretations or guidance as to its views. To be sure, NHTSA does not agree with other commenters who argue that this interpretative authority equates to the ability to issue binding interpretations. *See* Urban Air Initiative et al., Docket No. NHTSA–2021–0030–0423 (June 11, 2021). But the Agency nevertheless maintains the view expressed in the Proposal that NHTSA may properly announce interpretative views about matters of EPCA preemption if so desired. *See* CAFE Preemption NPRM, 86 FR at

Continued

many of them also read Section 32919 as silent on any role for NHTSA in further dictating the scope of EPCA preemption,[116] understood Section 32919's self-executing nature as actually foreclosing regulations that dictate additional express preemption requirements,[117] and viewed general delegations of authority to the Secretary of Transportation insufficient to support such a sweeping act of preemption.[118]

These comments reinforce the Proposal's substantial doubts about NHTSA's authority to promulgate the SAFE I Rules, which the Agency crystalizes in this final rule into a firm conclusion that the requisite authority does not exist. The lack of legal authority is most clearly illustrated by the inadequacy of the two grounds articulated by the SAFE I Rule (and comments who supported that position here) for the proposition that NHTSA enjoys authority to promulgate the regulations: (1) The general rulemaking authority of the Secretary of Transportation; and (2) more generalized inferences from the spirit of EPCA. The Agency finalizes its view that neither of these grounds suffices.

a. No Direct Statutory Authority Enables NHTSA To Promulgate the SAFE I Rule

First, NHTSA finalizes the view expressed in the Proposal that no direct statutory source exists for the Agency to derive authority to conduct the SAFE I rulemaking. In this respect, NHTSA focuses, in particular, on the two statutory provisions that commenters supporting the SAFE I Rule especially relied upon to argue that such authority existed: 49 U.S.C. 322 and 49 U.S.C. 32919. Neither of these provisions enables a legislative rulemaking action to establish new binding preemption requirements.

This analysis starts with Section 322 because that is the only source of statutory authority invoked in the SAFE I Rule. Notably, even though EPCA speaks directly to the fuel economy preemption issue in Section 32919, in the SAFE I rulemaking, NHTSA did not invoke Section 32919 to claim the authority to issue preemption regulations.[119] Instead, NHTSA claimed authority based on the Secretary of Transportation's ''general powers'' under Section 322 to ''carry out'' all responsibilities across the entire Department of Transportation. NHTSA argued at the time that this authority was sufficient because the Agency could not carry out its CAFE standard-setting responsibilities in the face of state regulation that undermined its authority.[120] In the SAFE I Final Rule's most direct discussion of the issue of authority to promulgate regulations concerning preemption, NHTSA linked the perceived conflict between EPCA's purposes and state regulation to the general delegation of authority to the Secretary to carry out his duties. Specifically, after describing Section 322 as an express authorization for the Secretary of Transportation ''to prescribe regulations to carry out her duties and powers,'' and noting that Chapter 329 of Title 49 delegated the Secretary's authority to NHTSA for EPCA purposes, the Agency concluded in the SAFE I Rule that it ''ha[d] clear authority to issue this regulation under 49 U.S.C. 32901 through 32903 to effectuate a national automobile fuel economy program unimpeded by prohibited State and local requirements.'' [121] This is because in the SAFE I Rule the Agency characterized that rulemaking as simply ''carry[ing] out'' the preemption scope of Section 32919.[122]

NHTSA concludes that the general authority for the Secretary to ''carry out'' his responsibilities across the entire Department of Transportation cannot supplant the otherwise strong indication that legally binding regulations on EPCA preemption exceed the scope of the Agency's authority. Nothing in the comments undermines the Proposal's straightforward recognition that Section 322 contains statutory language of broad applicability that extends well beyond the CAFE program and, indeed, well beyond NHTSA. It continues to seem especially peculiar to derive preemption authority from Section 322 when EPCA already contains an express preemption provision, which does not provide NHTSA with a role in further defining that preemption with the force and effect of law. Since Congress already crafted a specific provision to describe EPCA preemption in Section 32919, the more general terms of Section 322 would seem of much clearer applicability if Section 32919 had otherwise delegated NHTSA certain authorities or responsibilities to carry out. But as discussed below, Congress did not, in EPCA, appear to charge NHTSA with any authority or responsibility with respect to preemption regulations. Construing Section 322's general terms to independently provide NHTSA with the authority to issue legislative rules on EPCA preemption that override Section 32919's notable silence as to any role for NHTSA would require an extraordinarily expansive reading of Section 322, which neither Section 322 nor EPCA could support.

Moreover, inserting Section 322 into EPCA in such a manner would require a strained reading of EPCA, which contradicts the specific approach Congress consistently employed throughout EPCA to provide authority to the various agencies targeted by the statute. Unlike some other enactments, which are primarily aimed at enabling a particular agency or creating a specific program, EPCA sought to establish an interagency framework for energy independence, which spanned a host of agencies and their respective jurisdictions. For instance, at various points, Congress directs portions of EPCA to a variety of agencies, including but not limited to the Department of Transportation, the Environmental Protection Agency, the Department of Justice, the Federal Trade Commission, the Federal Maritime Commission,[123] and the Federal Power Commission.[124] Consistent with this approach, the facial language of EPCA tends to clearly state when and where Congress intended to galvanize an agency into acting on a particular provision. For instance, even just taking a few non-exhaustive examples from the original language of the specific section of EPCA dedicated to automotive fuel economy:

- Section 501(1) specifies that ''[t]he Secretary may prescribe such rules as may be necessary to implement this paragraph,'' which concerns the definitions of an automobile.[125]

25988 (''While NHTSA still retains interpretative authority to set forth its advisory views on whether a state regulation impermissibly conflicts with Federal law, such authority does not support the power to codify binding legislative rules on the matter.'').

[116] *See, e.g.,* Center for Biological Diversity et al., Docket No. NHTSA–2021–0030–0369 (June 11, 2021) (stressing that Section 32919 ''does not mention the Secretary or contemplate Federal regulations 'to carry out' congressional intent to preempt State and local laws.'').

[117] *See, e.g.,* National Coalition for Advanced Transportation, Docket No. NHTSA–2021–0030–0310 (June 11, 2021).

[118] *See, e.g.,* Emmett Institute on Climate Change and the Environment, Docket No. NHTSA–2021–0030–0218 (June 10, 2021) (''NHTSA also lacked the ancillary authority to adopt the 2019 Rule.'').

[119] *See generally* NHTSA, EPA, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, Final Rule, 84 FR 51310, 51320 (Sept. 27, 2019).

[120] *See, e.g., id.* at 51317.

[121] *Id.* at 51320.

[122] *Id.*

[123] *See generally* The Energy Policy and Conservation Act of 1975, Public Law 94–163, 89 Stat. 871.

[124] *Id.*

[125] *Id.* § 501(1) (''The term 'automobile' means . . .'').

• Section 501(2) links the term passenger automobile to that ''which the Secretary determines by rule.'' [126]

• Section 502 describes the circumstances, in detail, by which ''the Secretary shall prescribe, by rule, average fuel economy standards.'' [127]

• Section 505(a)(3) requires that ''the Secretary shall prescribe rules setting forth the form and content of the reports required under'' the Section.[128]

• Section 505(b)(1) describes the specific actions that the Secretary of Transportation and the EPA Administrator may take, such as conducting hearings, ''for the purpose of carrying out the provision of this part.'' [129]

• Section 506(a)(3) requires that ''the form and content'' of labeling requirements ''shall be prescribed by the EPA Administrator by rule.'' [130]

• Section 508(a)(3)(D) permits that ''the Secretary may prescribe rules for purposes of carrying the provisions of this paragraph,'' which pertains to civil penalties.[131]

The remainder of EPCA is replete with similar examples of Congress specifically—*and expressly*—speaking to the ability or need for the agencies to implement its provisions through a variety of regulatory actions. In contrast, as noted by both the Proposal and certain commenters, Section 32919 (originally Section 509 of EPCA) is notably silent as to any role of the agency in administering—much less defining—a preemption scheme. This is despite other preemption provisions in EPCA continuing Congress' general trend throughout the statute of more specifically enumerating the role of the agency when contemplating further agency implementation. For instance, as the Proposal noted, the structures of other parts of EPCA expressly charge an agency to administer preemption through regulations, and no such charge exists for NHTSA. For example, a precursor to the Department of Energy, the Federal Energy Administration, was expressly directed elsewhere in EPCA to ''prescribe . . . rule[s]'' that preempt state and local appliance energy conservation standards.[132]

This is also consistent with the manner in which Congress has provided preemption authority to the Department of Transportation in other contexts. The Proposal identified several of such examples, recognizing that, other DOT statutes expressly provide a regulatory, or even adjudicatory, role for the Department in the preemption analysis. For instance, in the transportation of hazardous materials context, 49 U.S.C. 5125 directs the Secretary to adjudicate applications on whether a particular state standard is ''substantially the same'' as Federal law and, as such, exempted from statutory preemption.[133] Similarly, 49 U.S.C. 31141 establishes a very detailed role for DOT in reviewing and preempting state law pertaining to commercial motor vehicle safety.[134] Many of the seminal cases in the Supreme Court's preemption jurisprudence also concerned statutory schemes that expressly delegated preemption authorities to the agencies in question.[135]

A few comments disputed the salience of these other preemption examples, with a joint comment submitted by CEI especially delving into the particulars of these preemption schemes. After analyzing each of these preemption statutes in turn, CEI concluded that those statutory preemption provisions in which Congress explicitly prescribed an agency's role all ''have one thing in common:'' A limited preemption scope that necessitates an agency's subsequent involvement, oftentimes through adjudication, to ''fine tune the scope of preemption.'' [136] CEI's joint comment stressed that, in contrast, Section 32919's silence as to any role for NHTSA was simply ''a reflection of the preemption's absoluteness.'' [137] In doing so though, CEI's comment demonstrates a critical difference in Section 32919 and these other statutory preemption provisions. In those other statutory preemption provisions analyzed by CEI's comment, Congress indisputably enumerated a preemption framework in which the agency in question played an active role in legally determining how statutory preemption applied to particular states and programs. In contrast, Section 32919 enumerates no such role for DOT or NHTSA, nor does it even leave room for subsequent implementation by the Agency. Instead, the self-executing terms of Section 32919 demonstrate that Congress intended the provision to operate without any ensuing requirements or legal determinations imposed by the Agency. Through its codification of new prescriptive requirements on EPCA preemption, the SAFE I Rule involved NHTSA taking the type of subsequent agency action not intended by Congress. Reading Section 32919 to permit NHTSA to promulgate binding regulations on EPCA requires an acceptance that NHTSA may authoritatively determine the reach of the self-executing (and legally self-sufficient) obligations stemming from the statute. But as CEI's comment highlights, Section 32919 seems to clearly *not* want the Agency to ''fine tune'' the legal mechanics of EPCA's preemptive scope.[138] But that is exactly what the power to issue legislative rules under Section 32919 would allow.

CEI's comment also argues that the examples from those other statutory provisions cannot inform this rulemaking because in those enactments Congress contemplated an adjudicatory role for the agencies rather than the rulemaking action undertaken in the SAFE I Rule. NHTSA does not believe this distinction negates the comparative value of those provisions. Of course, the SAFE I Rule was a generally applicable rule, not an adjudication or even simply an administrative enforcement action against any particular party. Even so, the preemption statutes described both in the NPRM and herein remain relevant comparisons even when they provide adjudicatory rather than rulemaking roles for an agency. In either case, the Agency is still exercising a core administrative decision-making function to implement the preemption statute in a legally binding way—adjudication just does that on a case-by-case basis whereas a rulemaking does

[126] *Id.* § 501(2) (''The term 'passenger automobile' means . . .'').

[127] *Id.* § 502 (''Average Fuel Economy Standards Applicable to Each Manufacturer'').

[128] *Id.* § 505(a)(3).

[129] *Id.* § 505(b)(1).

[130] *Id.* § 506(a)(3).

[131] *Id.* § 508(a)(3)(D).

[132] *See* 42 U.S.C. 6297.

[133] *See* 49 U.S.C. 5125(d) (The Secretary has delegated this responsibility to another DOT operating administration, the Pipeline and Hazardous Materials Safety Administration (PHMSA)).

[134] See 49 U.S.C. 31141 (expressly stating that ''[a] State may not enforce a State law or regulation on commercial motor vehicle safety that the Secretary of Transportation decides under this section may not be enforced'' before enumerating multiple subsections that define an adjudicatory role for the DOT, complete with preemption standards and procedures). The Secretary has delegated this responsibility to another DOT operating administration, the Federal Motor Carrier Safety Administration (FMCSA).

[135] For example, in a set of cases evaluating the preemption of certain state tort law relating to medical device product liability, the Supreme Court analyzed U.S. Food and Drug Administration (FDA) regulations that specifically defined when preemption occurred under the applicable statute, the Medical Device Amendments (MDA). *See generally Medtronic, Inc.* v. *Lohr,* 518 U.S. 470 (1996) (plurality opinion); *Riegel* v. *Medtronic, Inc.,* 552 U.S. 312 (2008). *See also* 21 U.S.C. 360k; 21 CFR 808.1.

[136] Competitive Enterprise Institute et al., Docket No. NHTSA–2021–0030–0411 (June 11, 2021).

[137] *Id.*

[138] *Id.*

that all at once.[139] In both cases, the question remains whether Congress intended the agency to further implement the statutory preemption scheme through legally enforceable agency action. The other statutory examples demonstrate that when Congress so intends agency implementation, the statutes in question facially articulate that role clearly and discernably in the text.

To the extent the differences in rulemaking and adjudication are pertinent to today's rulemaking, such differences only further support NHTSA's conclusions. For instance, CEI's comment stresses that these other statutory examples only articulate a role for agencies because ''subsequent regulatory adjudication'' is needed to implement their preemption frameworks (in contrast to Section 32919, which CEI characterizes as ''clear'').[140] However, even assuming CEI's premise is true, this only further supports the Proposal's conclusion by suggesting that adjudication—*not rulemaking*—was Congress' preferred method to statutorily engraft an agency into the legal process of formulating the scope of an express preemption provision. If so, the SAFE I Rule's attempt to use rulemaking to legally affect EPCA's preemptive scope appears even further from the scheme intended by Congress. Ultimately, no matter how these provisions are read, it is undeniable that Section 32919 stands apart from other statutory preemption schemes in which the agency is charged with a more active role in setting the scope of preemption in a legally binding way.

Commenters' other efforts to explain away Section 32919's silence are similarly unavailing. In particular, CEI's joint comment proffers two ''alternative explanations'' for the statute's silence. In the first, the comment argues that in enacting EPCA, Congress was simply naïve, unable ''in 1975 to anticipate the brazenness of 21st century 'climate ambition,' '' so presumably unaware of what CEI deems an eventual need for NHTSA to legally intercede on EPCA preemption.[141] However, this fails to account for the fact that the preemption provision of EPCA has been the subject of litigation for decades and, thus, questions about its scope are not new, even if the specific aspects of this issue change over time. Despite this, Congress has not materially changed the statutory language governing EPCA preemption, with the current language in Section 32919 remaining substantially the same as the language originally enacted in Section 509 of EPCA. Further, even if the recent actions by California and other states are somehow different than earlier preemption questions, it would not change what authority EPCA, as it is currently enacted, provides NHTSA.

Moreover, CEI's comment suggests that Congress perhaps intentionally eschewed a more precise description of delegated authority, preferring instead to tacitly provide authority through silence to avoid ''foster[ing] confusion and uncertainty.'' This position is both counterintuitive and disproved by EPCA's express text. First, it strains credulity to read EPCA's silence as Congress' concerted effort to still provide authority to the agency, but just in a more clear and unambiguous way than if it had done so expressly. As the rest of EPCA demonstrates, Congress understood how to carve out a legal role for an agency in a multitude of matters, including preemption, even when that role involved a complicated adjudicatory scheme. Moreover, since an agency's rulemaking actions must always fall within the scope of statutory authority, if Congress had any concerns about how that authority could be misapplied, it could have easily enacted language that set the parameters for any implementing agency regulations (as it did in Section 327 of EPCA).[142] As such, there is no reason to believe that Congress would have suddenly become wary of precisely describing such authority when it reached Section 32919. And a construction that requires such a leap does not offer the most reasonable reading of the statute.

Finally, at least one other commenter sought to diminish this contrast in statutory approaches by focusing not on the actual statutory language in question, but instead, on the legal doctrines underpinning administrative law. Specifically, a joint comment by the Urban Air Initiative argued at length that the Proposal's doubts about the delegation of statutory authority for the SAFE I Rule contradicted the Supreme Court's application of administrative law principles in *City of Arlington* v. *FCC.*[143] The comment presented *City of Arlington* for the proposition that since NHTSA administers the broader CAFE program and Section 32919 does not expressly prohibit the Agency from promulgating implementing regulations on EPCA preemption, the silence of Section 32919 should not serve as a barrier to NHTSA's SAFE I rulemaking authority.[144] As such, the comment concluded that the Proposal's approach would too finely parse an agency's authority on a provision-by-provision basis and undertake an unmanageably granular review of authority for federal administrative agencies.

NHTSA views this concern as unfounded and depending upon a protracted reading of *City of Arlington.* In *City of Arlington,* the Supreme Court reviewed a declaratory ruling by the Federal Communications Commission, which contained the agency's interpretation and subsequent implementation of its own regulatory jurisdiction under the Telecommunications Act of 1996.[145] The question presented in the case was ''[w]hether . . . a court should apply *Chevron* to . . . an agency's determination of its own jurisdiction.''[146] The Court ultimately held that *Chevron* deference should apply because, at their core, all agency constructions of a statute present jurisdictional issues.[147] This is because, the majority reasoned, agencies are always bound by statute, which renders any departure from a statute's intended scope or meaning also a transcendence of the agency's jurisdiction.[148]

The Urban Air Initiative's joint comment contends that, in light of *City of Arlington,* the Proposal's focus on whether Section 32919 confers rulemaking authority is an ''empty distraction'' and demonstrative of an overly burdensome undertaking that too narrowly searches for questions of authority or agency jurisdiction.[149] Read properly though, *City of Arlington* actually underscored the appropriateness of the Agency's concern about its own authority. The Urban Air Initiative's comment advances *City of Arlington* to argue that NHTSA need not worry about its statutory authority because no special class of jurisdictional questions exists. But the *City of Arlington* majority made clear that this is only because *all* questions about an agency's actions are jurisdictional. At base, *City of Arlington's* holding illustrates the exact point repeated

[139] *See, e.g. SEC* v. *Chenery Corp.,* 332 U.S. 194 (1947) (discussing overlap between the adjudicatory and rulemaking functions of an agency).

[140] *See* Competitive Enterprise Institute et al., Docket No. NHTSA–2021–0030–0411 (June 11, 2021).

[141] Competitive Enterprise Institute et al., Docket No. NHTSA–2021–0030–0411 (June 11, 2021).

[142] *See* The Energy Policy and Conservation Act of 1975, Public Law 94–163, 89 Stat. 871, section 327(b), recodified as amended at 42 U.S.C. 6297(d).

[143] Urban Air Initiative et al., Docket No. NHTSA–2021–0030–0423 (June 11, 2021) (discussing 569 U.S. 290 (2013)).

[144] *Id.*

[145] *See generally City of Arlington, Tex.* v. *F.C.C.,* 569 U.S. 290 (2013).

[146] *Id.* at 295 (ellipses in original).

[147] *Id.*

[148] *Id.* at 299–300.

[149] Urban Air Initiative et al., Docket No. NHTSA–2021–0030–0423 (June 11, 2021).

throughout this rulemaking: because agencies have no plenary jurisdiction, agencies' ''power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires.'' [150] As a result, any time the agency implements a statute the question ''is always whether the agency has gone beyond what Congress has permitted it to do, there is no principled basis for carving out some arbitrary subset of such claims as 'jurisdictional.' '' [151] This is even apparent when the Court's phrase of ''empty distraction'' is read in its full context: ''The [jurisdictional] label is an *empty distraction* because every new application of a broad statutory term can be reframed as a questionable extension of the agency's jurisdiction.'' [152] Consequently, far from ignoring this precedent as the comment claims, NHTSA views this rulemaking as conducting the precise analysis contemplated by the Court—ensuring that its regulatory activities conform to their governing statutory authorities.[153]

Moreover, even the broader holding of *City of Arlington* supports NHTSA's conclusions in this rulemaking. The Court's ultimate holding in the case is that, because all questions are essentially jurisdictional, an agency should be entitled to *Chevron* deference when construing the scope of its statutory authority, even when those questions concern the subjects on which an agency may regulate.[154] The *Chevron* doctrine is, of course, a multi-dimensional analysis, and thus deference to a reasonable interpretation only arises in the first place if the statutory language is ambiguous.[155] Here, NHTSA views the lack of rulemaking authority as a clear and unambiguous reading of Section 32919, for all of the reasons described herein. However, even if Section 32919 were considered to be ambiguous on the existence of authority, as several commenters contended, the *City of Arlington* framework stressed by those commenters still supports extending deference to NHTSA for its determination in this repeal that the Agency lacked authority to promulgate the SAFE I Rule. In fact, if such an ambiguity were deemed to exist, that is the precise type of determination for which *City of Arlington* made clear deference should apply: ''[t]he question here is whether a court must defer under *Chevron* to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's statutory authority (that is, its jurisdiction).'' [156]

Similarly, *Chevron* also does not support a claim that the SAFE I Rule was tacitly authorized in order ''to fill any gap left'' by Congress in Section 32919's statutory scheme.[157] *Chevron* and its progeny recognize that, in some instances, statutory ambiguities or ''gaps'' in statutory frameworks indicate that Congress contemplated an agency acting in order to resolve such ambiguities.[158] In these situations, an incomplete statutory scheme raises the possibility that Congress ''implicitly or explicitly'' intended the agency to step in and undertake rulemaking to provide the missing pieces and enable the statute's administration.[159] However, as described throughout this reconsideration, EPCA and Section 32919 clearly demonstrate that Congress did not intend for NHTSA to further implement or administer Section 32919.

This is evident because, as the Proposal recognized, both the Agency and courts have repeatedly understood Section 32919 as self-executing and capable of direct application to state regulatory activity.[160] Specifically, such a direct application involves the consideration of whether the state regulation in question ''relate[s] to'' fuel economy standards established elsewhere in Chapter 329.[161] The statute does not require any supplemental agency regulations to implement this standard, nor does the text and structure of the statute appear to provide NHTSA any special legislative role in dictating the scope of Section 32919's preemption. This view is consistent with NHTSA's longstanding reading of Section 32919. For instance, even the Preamble to the SAFE I Final Rule acknowledged that the EPCA preemption provision of Section 32919 was ''self-executing,'' asserting that ''state or local requirements related to fuel economy standards are void ab initio''—by operation of statute not regulation.[162] Likewise, in the NEPA section of the SAFE I Rule, NHTSA expressly disclaimed any discretion to alter the preemption paradigm established by Section 32919 due to the self-sufficiency of the statute, stressing that ''[a]ny preemptive effect resulting from this final action is not the result of the exercise of Agency discretion, but rather reflects the operation and application of the Federal statute.'' [163] As such, the Agency again characterized any ''preempted standards [as] void ab initio'' due to the non-discretionary and independent application of Section 32919.[164]

The self-executing nature of Section 32919 formed one of the most widely agreed-upon propositions in the Proposal. Commenters on all sides of the issue expressly confirmed their own understanding of Section 32919 as self-executing and capable of direct enforcement and application against preempted programs. For instance, commenters in support of the Proposal expressly agreed that ''[i]n the absence of the Preemption Rule, any state law or regulation 'relating to fuel economy standards' can be challenged in a proper case, allowing for full evaluation of both the state law and the express statutory preemption in Section 32919,'' [165] that ''implementing EPCA Section 32919'' does not require any NHTSA regulations,[166] and that ''[c]ourts have likewise treated the EPCA preemption language as self-executing as they have applied this language to particular circumstances to determine whether a

[150] *City of Arlington, Tex.,* 569 U.S. at 297–98.

[151] *Id.*

[152] *Id.* at 300 (emphasis added).

[153] Similarly, the joint comment submitted by the Urban Air Initiative argues that because these issues are irrelevant, NHTSA is simply manufacturing issues to conceal the ''political pretext'' for a repeal of the SAFE I Rule. *See* Urban Air Initiative et al., Docket No. NHTSA–2021–0030–0423 (June 11, 2021). But this contradicts the authorities cited here, which encourage an agency to closely assess its statutory authority, as NHTSA is doing in this rulemaking. These commenters may disagree with NHTSA's ultimate conclusions in this rulemaking, but dismissing the concerns surrounding the SAFE I Rule as merely ''pretextual'' ignores the litany of legitimate issues articulated in this rulemaking, as well as the substantial number of thoughtful comments expressing additional concerns about the SAFE I Rule.

[154] *City of Arlington, Tex.,* 569 U.S. at 297–98.

[155] *See generally Chevron, U.S.A., Inc.,* 467 U.S. 837.

[156] *City of Arlington, Tex.,* 569 U.S. at 296–97.

[157] *See* NHTSA, EPA, Withdrawal of Waiver; Final Rule, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, Final Rule, 84 FR 51310, 51351 (Sept. 27, 2019) (quoting *Chevron,* 467 U.S. at 843).

[158] *See, e.g., Chevron,* 467 U.S. at 843.

[159] *Id.*

[160] *See, e.g., Green Mountain Chrysler Plymouth Dodge Jeep* v. *Crombie,* 508 F. Supp. 2d 295 (D. Vt. 2007) (undertaking a detailed analysis of Section 32919 to determine whether state law was preempted under the express language of the statute).

[161] *See Cent. Valley Chrysler-Jeep, Inc.* v. *Goldstene,* 529 F. Supp. 2d 1151, 1175 (E.D. Cal. 2007), as corrected (Mar. 26, 2008) (conducting such an analysis before concluding that preemption did not exist ''[g]iven the narrow scope the court must accord EPCA's 'related to' language'').

[162] NHTSA, EPA, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, Final Rule, 84 FR 51310, 51325 (Sept. 27, 2019).

[163] *Id.* at 51353–54.

[164] *Id.*

[165] South Coast Air Quality Management District, Docket No. NHTSA–2021–0030–0446 (June 11, 2021).

[166] Tesla, Inc. Docket No. NHTSA–2021–0030–0398 (June 11, 2021).

state or local government action is or is not preempted.'' [167] Similarly, commenters that otherwise more neutrally commented on other aspects of the Proposal still explicitly endorsed Section 32919's self-executing status.[168] And commenters opposing the Proposal nonetheless still stressed that they ''agree that the statute is self-executing and that any state regulation that is 'related to fuel economy' is preempted and void ab initio.'' [169] For this reason, even opposition commenters stated that ''[c]onsequently, the SAFE I Rule's regulatory language is not essential to effectuate'' EPCA preemption.[170]

Although commenters widely agreed on Section 32919's self-executing status, a small number of comments opposing the Proposal tried to argue that this status did not preclude the SAFE I Rule. For instance, a joint comment submitted by CEI argued that Section 32919 still ''has no practical effect unless someone interprets and implements it.'' [171] This misses the central point of the issue though. Since Section 32919 is self-executing, a regulation is not needed to implement the preemption provision, and, moreover, nothing in Section 32919 provides any authority to issue a binding rule on the scope of preemption. In that respect, Section 32919 fundamentally differs from other EPCA statutory provisions, such as Section 32902, which sets a general CAFE framework that must be implemented by NHTSA periodically ''prescrib[ing] by regulation'' the actual CAFE standards that govern particular model years.[172] EPCA is replete with other examples of those types of statutes requiring regulatory implementation.[173] In contrast, Section 32919 contains all of the elements necessary for implementation within the four corners of its statutory language.[174] This is not just theoretical, but evident from the numerous times Section 32919 has directly supported a private right of action seeking to enforce its preemption provisions in Federal court.[175]

To the extent that CEI means that Section 32919 has no practical effect unless it is *enforced,* as explained further in the next section, by promulgating regulations of general applicability, the SAFE I Rule was an act of rulemaking not enforcement. As such, whether Section 32919 needs to be enforced in a particular case has no bearing on whether NHTSA enjoys rulemaking authority to codify a regulation of general applicability.

Ultimately, the self-executing nature of Section 32919 demonstrates that Congress did not establish a rulemaking role for NHTSA in EPCA preemption. Instead, Congress enacted a statutory provision that operates fully on its own, without any discernable responsibility for the Agency in further implementing the scope of Section 32919 through regulations.

b. The Requisite Rulemaking Authority Cannot Be Generally Inferred From EPCA

Both the SAFE I Rule and commenters to the Proposal defending that Rule also argued that the spirit of EPCA hints at the need for such rulemaking authority. NHTSA continues to find this argument unavailing and, as such, is finalizing the Proposal's view that generalized inferences drawn from EPCA cannot sustain the provisions codified in the SAFE I Rule. Moreover, NHTSA views many of the themes and inferences that commenters invoked for this proposition inapposite, as they mischaracterize the nature of the SAFE I Rule. As such, nothing from these purported inferences changes NHTSA's conclusion that the SAFE I Rule was an *ultra vires* rule that must be repealed.

The SAFE I Rule sought to justify the rulemaking on predominantly policy grounds, characterizing the express preemption measure as necessary to fulfill other CAFE responsibilities delegated to the Agency. In particular, the SAFE I Rule argued that the regulation was needed to resolve a perceived irreconcilable conflict between state GHG emissions regulations and ZEV mandates and EPCA's delegation of authority to NHTSA to set national fuel economy standards.[176] The SAFE I Rule thus rationalized the regulations by emphasizing that ''Congress's intent to provide for uniform national fuel economy standards is frustrated when State and local actors regulate in this area.'' [177]

In particular, the SAFE I Rule suggested that the rulemaking was essential to guard against states or local jurisdictions undermining the CAFE program. For instance, the Agency repeatedly expressed that the regulations targeted ''State requirements that *impermissibly interfere* with [the Agency's] statutory role to set nationally applicable standards,'' [178] that implementing the provisions was necessary to foreclose state and local requirements that ''*conflict* with NHTSA's ability to set nationally applicable standards,'' [179] and that the action was necessary because ''Congress's intent to provide for uniform national fuel economy standards is *frustrated* when State and local actors regulate in this area.'' [180]

A large number of the comments supporting the SAFE I Rule expressed this same idea. This theme is illustrated, for example, by a joint comment from CEI, which stresses that without the SAFE I Rule, California (through CARB) would be positioned to ''balkanize auto markets unless it gets its way'' in dictating motor vehicle emissions and fuel economy standards.[181] Like the SAFE I Rule, such commenters focused on the need for the provision ''to avoid potential conflicts with EPCA's national fuel economy standards,'' [182] and provided extensive analysis purporting to show how particular programs are poised to ''undermine CAFE's flexible fleet-average standards'' unless the SAFE I Rule's prohibitions remain in place.[183] Some commenters opposing a repeal even carried this theme to the point of describing the SAFE I Rule as

[167] National Coalition for Advanced Transportation, Docket No. NHTSA–2021–0030–0310 (June 11, 2021).

[168] Alliance for Automotive Innovation, Docket No. NHTSA–2021–0030–0400 (June 11, 2021) (Expressing that any offending local laws are ''automatically preempted under the terms of the statute. Federal courts can apply EPCA's preemption provision to any such law or regulation.'').

[169] American Fuel & Petrochemical Manufacturers, Docket No. NHTSA–2021–0030–0425 (June 11, 2021).

[170] National Automobile Dealers Association, Docket No. NHTSA–2021–0030–0435 (June 10, 2021). *See also* Urban Air Initiative et al., Docket No. NHTSA–2021–0030–0423 (June 11, 2021).

[171] Competitive Enterprise Institute et al., Docket No. NHTSA–2021–0030–0411 (June 11, 2021).

[172] *See* 49 U.S.C. 32902(a).

[173] *See supra* nn.125–131.

[174] A joint comment submitted by the Urban Air Initiative cites this point as evidence that the SAFE I Rule was a permissible interpretation because Section 32919 does not leave room for a regulation to create newly enforceable requirements. *See supra* nn.84–85. This aspect of the comment is fully addressed in an earlier portion of the final rule that explains how this argument ignores the plain language of the regulations codified in the SAFE I Rule.

[175] *See Cent. Valley Chrysler-Jeep, Inc.,* 529 F. Supp. 2d at 1175; *Green Mountain Chrysler Plymouth Dodge Jeep,* 508 F. Supp. at 295; *Ophir* v. *City of Boston,* 647 F. Supp. 2d 86, 91–92 (D. Mass. 2009).

[176] NHTSA, EPA, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, Final Rule, 84 FR 51310, 51319 (Sept. 27, 2019).

[177] *Id.* at 51313.

[178] *Id.* at 51317 (emphasis added).

[179] *Id.* at 51319 (emphasis added).

[180] *Id.* at 51313 (emphasis added).

[181] Competitive Enterprise Institute et al., Docket No. NHTSA–2021–0030–0411 (June 11, 2021).

[182] National Automobile Dealers Association, Docket No. NHTSA–2021–0030–0435 (June 10, 2021).

[183] Urban Air Initiative et al., Docket No. NHTSA–2021–0030–0423 (June 11, 2021) (labeling an entire section of the comment ''State electric automobile quotas restrict manufacturer compliance choices and undermine CAFE's flexible fleet-average standards.'').

akin to an enforcement action, necessary for NHTSA to police EPCA's congressional purpose in the face of ''lawless'' states and local jurisdictions.[184] [185]

The idea that the SAFE I Rule is necessary to prevent states and local jurisdictions from frustrating EPCA or NHTSA's national CAFE program is inconsistent with a properly applied preemption framework. In the absence of the SAFE I Rule, two fundamental preemption mechanisms still exist to guard against state or local programs that sufficiently conflict with CAFE to render EPCA's purposes a nullity.[186] First, as described throughout this final rule, a repeal of the SAFE I Rule does not affect the statutory express preemption provision in Section 32919. This self-executing statutory provision is fully capable of enforcement against offending state and local programs in the absence of any regulations purporting to further implement its scope. In fact, before the SAFE I Rule, this provision had provided this function for years without implementing regulations. Here, Section 32919's plain language illustrates how Congress' preemptive scheme is immediately executable upon NHTSA promulgating the *substantive law* (national fuel economy standards) rather than any express preemption provisions. At most, the statute merely refers to the substantive tasks of the agency to establish ''fuel economy standard[s]'' and ''requirements'' as set forth elsewhere in Chapter 329.[187] Such references only connote the core duties borne by the agency to administer the substance of the fuel economy program, such as by setting ''maximum feasible average fuel economy'' standards under Section 32902 or establishing fuel economy labeling requirements under Section 32908. These responsibilities are within the Agency's traditional substantive regulatory functions, which draw from NHTSA's technical automobile expertise rather than any special agency authority over federalism.

As such, it is not necessary for NHTSA to codify new express preemption provisions in order to ''carry out'' EPCA. All NHTSA needs to do is fulfill the substantive task enumerated in Section 32919: Ensuring ''an average fuel economy standard prescribed under this chapter is in effect.'' [188] Once such a standard is in place, Section 32919's self-executing standard is fully capable of safeguarding Congress' purpose in EPCA. Moreover, as explained in Section II.B.iii. of this final rule, the familiar ''related to'' standard in Section 32919 may even be clearer to apply and understand without the convoluted layer of the SAFE I Rule. Accordingly, even assuming the concerns raised by such commenters are accurate, they are fully redressable by the statutory express preemption language in Section 32919, which remains untouched by this rulemaking.

More fundamentally though, even after today's repeal of the SAFE I Rule, judicial concepts of implied preemption will remain available to perform their traditional function of guarding against state law that sufficiently interferes with the supremacy of federal law. In fact, the concepts used by the SAFE I Rule (and commenters defending it) to justify rulemaking authority were actually more appropriately applied to an implied preemption analysis instead.[189] The terminology repeatedly employed throughout the SAFE I Rule—''frustrates,'' [190] ''conflicts,'' [191] and ''interferes'' [192]—mirrors the standards often arising in implied preemption. Implied preemption is a judicial doctrine principally applied by courts when adjudicating challenges to particular state programs.[193] The judicial standards for implied preemption remain available to presiding courts irrespective of the presence of the SAFE I Rule. Therefore, if state and local jurisdictions endanger EPCA to the degree claimed by those commenters, there is no reason to believe that Article III courts could not evaluate those claims through the lens of implied preemption, as has been the case throughout the long history of both EPCA and all other federal law.[194]

Moreover, as a judicial doctrine intended for application in a particular case, principles of implied preemption do not support NHTSA claiming authority to conduct a rulemaking of general applicability.[195] Instead, this rulemaking act of promulgating new prescriptive preemption requirements, which are expressly codified in law, involves a separate act of rulemaking authority to impose express preemption through regulations. NHTSA's rulemaking authority to do so is governed by the principles already discussed above in Section II.B.i—not the judicial concepts that govern whether a Federal court should deem a state program impliedly preempted by the supremacy of existing federal law. Therefore, the concepts of implied preemption invoked by NHTSA to justify the SAFE I Rule were misapplied. They exist to enable a court to determine whether a state program conflicts with *existing federal law,* not

[184] *See* Urban Air Initiative et al., Docket No. NHTSA–2021–0030–0423 (June 11, 2021). *See also* American Fuel & Petrochemical Manufacturers, Docket No. NHTSA–2021–0030–0425 (June 11, 2021); Competitive Enterprise Institute et al., Docket No. NHTSA–2021–0030–0411 (June 11, 2021).

[185] The SAFE I Rule was not an enforcement action, and NHTSA's portion of the Rule was not (unlike EPA's portion) even an adjudication. Instead, as described throughout this final rule, the SAFE I Rule codified rules of general applicability, which instituted preemption requirements for all states so long as the rule remained in effect. As such, even if those commenters' arguments explain the background for *why* NHTSA tried to undertake the SAFE I Rule, they cannot justify *how* NHTSA acted through a legislative rulemaking of general applicability. For that, it is necessary to instead focus on the issues of rulemaking authority that form so much of this final rule.

[186] Through this, NHTSA stresses that it takes no position in this rulemaking on whether EPCA preemption either expressly or impliedly preempts the particular state and local programs identified by such commenters. The point here is that these mechanisms persist to weigh such commenters' concerns, not that their substantive concerns are substantiated.

[187] See 49 U.S.C. 32919(a)–(b).

[188] *See* 49 U.S.C. 32919(a).

[189] For instance, the Supreme Court has expressly clarified that when its precedent preempts state laws ''when they conflict with or interfere with federal authority over the same activity,'' such an opinion ''is best read as a conflict pre-emption case.'' *See Oneok, Inc.* v. *Learjet, Inc.,* 575 U.S. 373, 389 (2015) (discussing *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore,* 487 U.S. 354, 373 (1988)).

[190] *City of New York,* 486 U.S. at 64 (''The statutorily authorized regulations of an agency will pre-empt any state or local law that *conflicts* with such regulations or frustrates the purposes thereof'') (emphasis added).

[191] *See, e.g., Wyeth* v. *Levine,* 555 U.S. 555, 576 (2009) (''This Court has recognized that an agency regulation with the force of law can pre-empt *conflicting* state requirements'') (emphasis added).

[192] *See, e.g., Patriotic Veterans, Inc.* v. *Indiana,* 736 F.3d 1041, 1051 (7th Cir. 2013) (describing how under the doctrine of conflict preemption, state law may be preempted ''if it *interferes*'' with federal law) (emphasis added).

[193] *See, e.g., Freightliner Corp.* v. *Myrick,* 514 U.S. 280, 287 (1995) (explaining that implied conflict preemption may exist in particular situations ''where it is impossible for a private party to comply with both state and federal requirements or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'') (internal quotations omitted). *See also, e.g., CSX Transp., Inc.* v. *Easterwood,* 507 U.S. 658, 663 (1993) (''Where a state statute conflicts with, or frustrates, federal law, the former must give way.'').

[194] Commenters opposing a repeal even appeared to recognize as much, as several argued that state and local programs prohibited by the SAFE I Rule were also impliedly preempted. *See, e.g.,* American Fuel & Petrochemical Manufacturers, Docket No. NHTSA–2021–0030–0425 (June 11, 2021) (arguing that such programs ''are impliedly preempted because they 'stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" in EPCA) (internal citations omitted).

[195] Judicial applications of implied and express preemption illustrate how they are separate concepts, which are applied regimentally by courts rather than as a monolithic preemption analysis. *See, e.g., Geier* v. *Am. Honda Motor Co.,* 529 U.S. 861, 869 (2000).

to empower NHTSA to *make more federal law,* as the Agency claimed in the SAFE I Rule. Accordingly, since NHTSA has already applied the proper rulemaking authority framework in Section II.B.i. above and determined that such authority was lacking for the SAFE I Rule, judicial concepts of implied preemption cannot cure this deficit of authority. Moreover, they do not need to, because an implied preemption review remains available irrespective of the fate of the SAFE I Rule.

ii. NHTSA Continues To Consider a Repeal of the SAFE I Rule Appropriate Even if the Agency Had Discretion To Conduct the Original Rulemaking

In addition, even if the Agency either had sufficient authority to issue the SAFE I Rule as a legislative rule or, alternatively, if the prior Rule was simply an interpretation, the Agency nevertheless continues to consider a repeal justified by other considerations as well. Specifically, the SAFE I Rule purported to preempt an entire segment of emissions regulations from state and local jurisdictions without fully considering a number of variables pertinent to the preemption determination. By ignoring these factors, the Rule was still legally flawed because it ignored legally relevant considerations that should have informed both the nature and scope of the Agency's preemption determination. Likewise, in overlooking such important considerations, the SAFE I Rule also improvidently imposed preemption in absolute terms when a more narrowly tailored approach was available instead.

a. The Categorical Scope of Preemption in the SAFE I Rule Inappropriately Ignored Important Interests of States and Local Jurisdictions

In the Proposal, the Agency expressed a concern that the categorical preemption views announced in the SAFE I Rule were insufficiently tailored to account for state federalism interests because they labeled an entire segment of state and local regulation as preempted, irrespective of the precise contours of any particular programs, regulations, or technological developments that may arise. This alarm especially arose from the SAFE I Rule's declaration of preemption through terms that were incontrovertible or absolute in a way that would not account for the nuanced and careful consideration of program-specific facts called for in preemption analyses. The comments to this Proposal substantiated these concerns. In particular, the majority of states and local jurisdictions who commented on the Proposal provided tangible examples of the types of nuances and federalism hardships that the SAFE I Rule failed to consider.

NHTSA continues to consider the federalism concerns in this arena as constituting substantial interests of states and local jurisdictions, who oftentimes seek to address pivotal matters of public health and welfare through the programs impinged by the SAFE I Rule. In this respect, the Agency remains mindful that an ''administrative interpretation [which] alters the federal-state framework by permitting federal encroachment upon a traditional state power'' merits particularly careful consideration to fully account for the significant federalism interests of states.[196] Likewise, Executive Order 13132 underscores the importance of considering federalism interests, stressing that ''[t]he national government should be deferential to the States when taking action that affects the policymaking discretion of the States and should act only with the greatest caution where State or local governments have identified uncertainties regarding the constitutional or statutory authority of the national government.'' [197] Nevertheless, by imposing a categorical and rigid approach to preemption, the SAFE I Rule prematurely discarded such federalism considerations despite the potential for more narrowly tailored approaches instead. As such, the SAFE I Rule both impermissibly ignored legally relevant variables of state programs and imprudently adopted a broader approach than necessary in instituting immutable preemption requirements.

For instance, in the Proposal, the Agency expressed a concern that in a number of cases, the policies preempted by the SAFE I Rule also served as components of the states' compliance with air pollution mitigation requirements delegated to states under the Federal Clean Air Act.[198] This issue formed one of the more common refrains in comments from states and local jurisdictions subject to the SAFE I Rule's preemption determination, who stressed that the prior rulemaking failed to consider—or even acknowledge—their reliance interests in motor vehicle emissions regulations as a critical component in achieving National Ambient Air Quality Standards (NAAQS). NAAQS levels are set by the EPA for six separate ubiquitous air pollutants, and states are required to achieve and maintain them under federal law. A survey of the comments indicates that feedback on the ways in which the SAFE I Rule could undermine compliance with the NAAQS was overwhelming. For example, a comment by the National Association of Clean Air Agencies, a group of 115 local air agencies spanning 41 states, the District of Columbia, and four territories, stressed that programs prohibited by the SAFE I Rule ''enable long-term planning and yield critical emission reductions that will contribute significantly to states' abilities to meet their statutory obligations to attain and maintain the health-based [NAAQS] for criteria pollutants.'' [199] Separate comments submitted by the Ozone Transport Commission Mobile Sources Committee, a body comprised of 12 states and the District of Columbia, as well as the Nevada Division of Environmental Protection, and the District of Columbia Department of Energy and Environment, reiterated this point as well.[200] Maine's Department of Environmental Protection likewise commented to reiterate that these particular reliance interests are not new but rather have existed since the inception of such state programs, noting that ''the [California low emission vehicle] program was initially created to help attain and maintain the health-based [NAAQS] for criteria pollutants.'' [201]

Commenters made clear that these reliance interests were tied to programs in place at the time of the SAFE I Rule's promulgation. For instance, California's South Coast Air Quality Management District described how the SAFE I Rule invalidated ''state pollution control standards which have been previously approved into State Implementation Plans (SIPs).'' [202] The State of California's comment described this reliance in depth, noting that California's preempted regulatory programs arose from what the State described as its longstanding

[196] *See Solid Waste Agency of N. Cook Cty.* v. *U.S. Army Corps of Engineers,* 531 U.S. 159, 173 (2001).

[197] Executive Order 13132, Federalism, Sec. 1(a) (Aug. 4, 1999).

[198] CAFE Preemption NPRM, 86 FR at 25989.

[199] National Association of Clean Air Agencies (NACAA), Docket No. NHTSA–2021–0030–0140 (June 10, 2021).

[200] Ozone Transport Commission, Docket No. NHTSA–2021–0030–0139 (June 10, 2021); Nevada Division of Environmental Protection, Docket No. NHTSA–2021–0030–0362 (June 11, 2021); District of Columbia Department of Energy and Environment, Docket No. NHTSA–2021–0030–0412 (June 11, 2021).

[201] Maine Department of Environmental Protection, Docket No. NHTSA–2021–0030–0249 (June 10, 2021).

[202] South Coast Air Quality Management District, Docket No. NHTSA–2021–0030–0446 (June 11, 2021).

understanding of EPCA prior to the SAFE I Rule, which resulted in ''weighty state interests, developed over the course of decades of implementing these state laws.'' [203] This prolonged reliance on the regulatory framework in place well before the SAFE I Rule led California to invest substantial resources in the development of affected state programs, as well as ''base long-term state planning'' on the continuation of these programs into the future.[204]

In addition, states and local jurisdictions similarly feared that by losing the state regulatory programs on which they had relied, the jurisdictions faced substantial detrimental consequences if they failed to meet required NAAQS levels. For example, a comment from a collective of municipal entities stressed that ''vehicle emissions impact air quality and a community's ability to meet required ozone levels. Falling outside of required ozone levels can have negative impacts on cities, potentially disqualifying them from federal funding opportunities for highway and transit infrastructure.'' [205] The Connecticut Department of Transportation commented similarly, noting that undermining state programs in this area was particularly harmful to state interests, as satisfying NAAQS requirements was already a difficult endeavor, which only became harder after the SAFE I Rule.[206] The Agency also received comments about this issue from the electricity industry, which expressed unease that by undermining established frameworks for NAAQS compliance, the SAFE I Rule could disrupt regulatory schemes in other industries as well.[207]

In the SAFE I Rule, NHTSA expressly ''reject[ed] the notion that California has valid reliance interests'' in preexisting state regulations and programs, largely because the Rule labeled those programs broadly preempted under the framework announced in the rulemaking.[208] Upon reconsideration, the Agency views its original logic in this respect as circular, amounting to a conclusion that NHTSA need not consider whether the breadth of its new regulations adequately considered particular issues, such as federalism or reliance interests, because those interests were already preempted according to the scope articulated by the SAFE I Rule. However, as the comments to the current proposal demonstrate, numerous states and local jurisdictions continue to harbor deep concerns about the SAFE I Rule's sweeping prohibition of programs on which they relied to accomplish important state regulatory priorities—required by federal law that was not altered in the SAFE I Rule—and promote the health and welfare of their citizens. Accordingly, NHTSA concludes that the SAFE I Rule inappropriately instituted an absolute preemption scheme that foreclosed any consideration for whether a more narrowly tailored approach was available instead.

A few commenters that objected to the Proposal touched upon federalism issues, which the Agency do not believe persuasively argue for continuing the approach in the SAFE I Rule. First, the American Fuel & Petrochemical Manufacturers (AFPM) stated that ''it [was] impractical to provide informed comment'' on the extent of federalism at stake in the Proposal because the Proposal spoke about preemption broadly rather than by reference to the status of specific state or local programs.[209] At base, this comment implies that NHTSA may not conduct an informed reconsideration of the SAFE I Rule without simultaneously announcing new substantive positions on how EPCA preemption applies to particular programs. However, the Agency already outlined the reasons such a view was unavailing in Section II.A. of this notice. Moreover, this comment illustrates the advantages of a more nuanced approach to the preemption issue than what had been taken in the SAFE I rulemaking, as the issue may vary based on the particular program at issue. In that respect, this comment underscores the exact point that NHTSA has raised throughout this rulemaking: The idea that a categorical and preemptive prohibition of state programs is not an opportune way to deal with EPCA preemption because the precise variables that inform the analysis likely differ for each case and potentially factor into the accuracy of the individual preemption analyses. AFPM's comment assumes such unknown variables and ''vagaries'' support retaining the SAFE I Rule, because absent specific context about a particular program it is impossible to conduct the full preemption analysis. But it was the SAFE I Rule that originally imposed preemption at a categorical level, without regard for the context-specific inquiries needed to conduct the full preemption analysis. As such, AFPM's emphasis on the need to understand the specifics of the programs affected by a preemption discussion only illustrates one of the critical deficiencies of the SAFE I Rule's preemption analysis, which this repeal rectifies.

AFPM's comment also concludes that states have a diminished federalism interests in this area because ''Congress has clear authority to regulate mobile sources that move in interstate commerce'' and ''EPCA expressly and clearly establishes that federal law preempts state laws 'related to' fuel economy.'' [210] However, this argument simply begs the substantive question of which programs Congress intended to preempt under EPCA. As explained throughout this final rule, the Agency believes that the categorical approach taken in the SAFE I Rule is flawed on this question, as it ignores the potentially varying characteristics of existing or even still-undefined future programs and the degree to which those diverse attributes may bear upon the EPCA preemption inquiry.

Similarly, comments such as AFPM's seek to minimize the SAFE I Rule's effect on federalism interests by stressing that the ''SAFE I Rule has no impact on states' abilities to adopt emissions regulations that are not related to fuel economy, or to establish vehicle registration fees, taxes and other'' such policies.[211] Even if true, this argument still presumes that the SAFE I Rule established a clear delineation between programs prohibited under its regulations and those that survived. However, as described further in Section II.B.iii. of this final rule, the SAFE I Rule did not so clearly define the contours of preemption. Instead, it only introduced new undefined standards into the preemption discourse. Beyond this, it is insufficient to say that a rulemaking that categorically forecloses some important federalism interests is acceptable because at least it did not eliminate all federalism interests. As evidenced by

[203] State of California et al., Docket No. NHTSA–2021–0030–0403, (June 11, 2021) (this comment also expressed that the SAFE I Rule ''declared preempted long-standing laws that protect public health and welfare and exercise core state police powers carefully preserved by Congress in the Clean Air Act.'') (citing Cal. Code Regs. tit. 13, § 1960.1(g)(2) (1991)).

[204] State of California et al., Docket No. NHTSA–2021–0030–0403 (June 11, 2021).

[205] National League of Cities et al., Docket No. NHTSA–2021–0030–0421 (June 11, 2021).

[206] *See* Connecticut Department of Transportation, Docket No. NHTSA–2021–0030–0330 (June 11, 2021).

[207] *See* Edison Electric Institute, Docket No. NHTSA–2021–0030–0396 (June 11, 2021) (expressing a concern that ''NHTSA's broad preemption codification in SAFE I would compel states to shift the emissions reductions they need for NAAQS attainment from automobiles to stationary sources, including electric power generators.'').

[208] CAFE Preemption NPRM, 86 FR at 51327.

[209] American Fuel & Petrochemical Manufacturers, Docket No. NHTSA–2021–0030–0425 (June 11, 2021).

[210] *Id.*

[211] *Id.*

the comments (many of which are set forth above), commenting states and local jurisdictions almost uniformly emphasized the importance of the regulatory agendas they believe were foreclosed by the SAFE I Rule's preemptive scope, including regulatory programs that helped jurisdictions attain the federal Clean Air Act's NAAQS. These are substantial and legitimate interests that should not be overbroadly discarded, particularly through categorical prohibitions that unnecessarily foreclose opportunities to more carefully account for those federalism interests in particularized contexts.

These federalism interests are especially illustrated by the degree to which many of the state and local programs in question seek to address critical matters of health and welfare within local communities. The Proposal outlined a concern that a categorical preemption scope inappropriately foreclosed potential opportunities to address localized health and safety hazards facing states and communities by preventing local governments from identifying solutions needed for their individual citizens. This concern arose from the Proposal's recognition that states have indicated that the standards at issue were developed to protect the states' residents from dangerous air pollution and the states' natural resources from the threats posed by climate change. The comments to this Proposal continued to reiterate a prevailing concern that the SAFE I Rule inappropriately and unnecessarily deprived states and local jurisdictions of an important regulatory tool to address hazards facing their local communities.

Commenters opposing a repeal contested this point, arguing instead that ''the self-described purposes'' of any individual state program are irrelevant to the EPCA preemption analysis, which is solely concerned with the relationship between the state regulation in question and fuel consumption.[212] However, the position of these commenters does not properly account for the full scope of the SAFE I Rule. These commenters direct their views to the individualized application of EPCA preemption to particular state or local programs, arguing that no single purpose of an individual program can override whether EPCA preempts that program. But the SAFE I Rule was a rule of general applicability, not an adjudication of an individual program. As such, the SAFE I Rule did not limit its analysis to the preemption of a particular state program or narrow band of state regulation. Instead, the SAFE I Rule grouped an entire segment of possible state regulation, motor vehicle greenhouse gas emissions, and codified a regulation of general applicability that preempted all possible initiatives currently regulating in this segment or which may be devised in the future. This is a much broader act and one not required by Section 32919, which does not command NHTSA to issue any regulations, much less anticipatory regulations that prospectively foreclose entire regulatory topics. When evaluating whether such an unnecessarily broad scope was an appropriate approach, it is both relevant and prudent to consider in the aggregate what possible other purposes those preempted measures may have pursued. And when this inquiry indicates, as it has here, that preemptively prohibited programs are likely aimed at protecting the health and welfare of state populations, the Agency is right to ask whether a more narrowly tailored approach could have left more room for those objectives or at least deferred the total foreclosure of them until those programs were ripe for consideration.

In contrast, the SAFE I Rule prohibited all state policies in a vacuum, without any knowledge of even the most fundamental questions about those policies, such as whose regulations are at issue, what motor vehicle technologies are being regulated, which compliance paths may be available, or what technological or policy breakthroughs may occur in the future to alter the preemption analysis. Comments to the Proposal indicate that, when a more thorough and nuanced consideration of preemption is permitted, programs enveloped by the sweeping scope of the SAFE I Rule potentially relate to important goals of protecting health and welfare of local populations.

For instance, the State of California commented, noting that affected state programs were originally devised as a means of mitigating unique environmental challenges facing the state: ''California's greenhouse gas standards were first adopted 16 years ago in response to the prospect of disruptions in the states' water supply, increases in 'catastrophic wildfires,' damage to the State's extensive coastline and ocean ecosystems, aggravation of existing and severe air quality problems and related adverse health impacts, and more.'' [213] Even commenters opposing the Proposal acknowledged that the state programs at issue initially arose from an effort to enable states to address unique environmental challenges facing their communities.[214] Other commenters likewise raised concerns about localized health hazards from motor vehicle emissions, with a comment on behalf of a collective of medical associations stressing that local conditions from such emissions can ''form unhealthy ozone and particle pollution, which can lead to premature death, hospitalizations, missed days of work and school, asthma attacks and a host of other health problems.'' [215] Commenters also raised environmental justice concerns, describing these pollution hazards as not borne uniformly across the country, but instead particularly manifested in minority and low-income communities. For instance, the Bay Area Air Quality Management District commented to stress that the policy flexibility foreclosed by the SAFE I Rule was ''critical to protecting communities that suffer more from localized air pollution than others'' and especially essential ''to address disparate air pollution impacts that can harm local communities, particularly low income and communities of color in the San Francisco Bay Area.'' [216] Likewise, in summarizing health risks from enhanced motor vehicle emissions, the medical associations' comment identified these problems as ''disproportionately impact[ing] communities located near highways, ports, warehouses and other places where traffic is concentrated—which are

[212] National Automobile Dealers Association, Docket No. NHTSA–2021–0030–0435 (June 10, 2021).

[213] State of California et al., Docket No. NHTSA–2021–0030–0403 (June 11, 2021) (citing 2002 Cal. Stat. c. 200 (A.B. 1493) (Digest)).

[214] *See* Urban Air Initiative et al., Docket No. NHTSA–2021–0030–0423 (June 11, 2021) (describing the Section 209 waiver process under the Clean Air Act by explaining that ''Congress justified this waiver exception based on California's 'unique' smog (ground-level ozone) problems, caused by California-specific conditions such as the 'numerous thermal inversions that occur within that state because of its geography and prevailing wind patterns.'' ') (quoting California State Motor Vehicle Pollution Control Standards: Waiver of Federal Preemption Notice of Decision, 49 FR 18887, 18890 (May 3, 1984) (which itself cited 113 Cong. Reg. 30,948, (Nov. 2, 1967))).

[215] Allergy & Asthma Network et al., Docket No. NHTSA–2021–0030–0299 (June 4, 2021). *See also* Sierra Club Connecticut Chapter, Docket No. NHTSA–2021–0030–0378 (June 11, 2021) (expressing concern about localized ozone pollution in Connecticut and associated asthma risks), Sierra Club Toiyabe Chapter, Docket No. NHTSA–2021–0030–0161 (June 10, 2021).

[216] Bay Area Air Quality Management District, Docket No. NHTSA–2021–0030–0371 (June 11, 2021).

more likely to be low-income or communities of color.'' [217]

Despite such a diverse array of challenges, commenting states and local jurisdictions consistently agreed that the inflexibility of the SAFE I Rule's broad preemption determination foreclosed opportunities for them to develop innovative policy solutions to the unique issues they faced that were still consistent with Federal law. This need to allow for more innovative policy flexibility than permitted by the expansive terms in the SAFE I Rule but still potentially allowed under the more general terms of EPCA was echoed expressly by multiple commenters, such as the Connecticut Department of Transportation,[218] a collection of municipal entities,[219] and the National Coalition for Advanced Transportation, who feared that the SAFE I Rule ''inappropriately and unnecessarily dampen[ed] policy innovation at the state and local levels and investments across the country.'' [220] Several industry groups likewise commented to caution against unnecessarily restricting policy innovation at the present stage, in particular, as both the automotive and energy industries are in the midst of widespread transformations with the advent of new electrification technologies and approaches.[221] Precluding states from pursuing innovative opportunities to address such important matters of health and welfare demonstrates the degree to which the SAFE I Rule broadly undermined the federalism interests of such jurisdictions without regard for whether a more narrowly tailored consideration of EPCA preemption was available instead.

Finally, commenters that opposed the Proposal (and thus were supportive of the SAFE I Rule) argued that this latest rulemaking was a change in position by the Agency, in an effort to single it out as a departure from precedent. These commenters that opposed the Proposal, such as NADA and CEI, sought to minimize any significance of the SAFE I Rule's unprecedented exertion of preemption authority, with CEI's joint comment noting in particular that ''unprecedented violations call for unprecedented corrections.'' [222] These comments suggest that actions like the SAFE I Rule had never been necessary in the past because, they argue, no state or local jurisdiction had ever sought to contravene EPCA to the extent of California's Advanced Clean Car program.[223] But although the preambles to the SAFE I rulemaking discussed California's Advanced Clear Car Program at length, NHTSA's portion of the notice, (unlike EPA's portion) still was not an individualized adjudication of California's Advanced Clean Car Program. Instead, it was a rulemaking action to establish regulations that set a generally applicable definition of ''related to'' as it appears in Section 32919. The SAFE I Rule characterized this definition as binding not just on California's existing programs, but on any state and local efforts that fell within the text included in the appendices now or in the future. Moreover, unlike any other ''non-regulatory preamble language'' [224] NHTSA may have issued in the past, the SAFE I Rule codified the new preemption standards into regulatory text. In this respect, the SAFE I Rule far surpassed any of NHTSA's prior positions on EPCA preemption and introduced new codified requirements implementing statutory language that had been enacted nearly 50 years earlier.[225] The express preemption statute that the SAFE I Rule sought to define for the first time has existed for the entirety of the CAFE program, as EPCA's original enactment included text substantially similar to the current language in Section 32919. And California's Advanced Clean Car program was not the first time, over the course of EPCA's long history, that a state or local jurisdiction instituted a program that some challenged as preempted under EPCA. In fact, at least one of those other programs had even resulted in a Federal court order deeming it preempted by Section 32919.[226] Moreover, even California's initiatives were not new at the time of the SAFE I Rule. As California's comment to this Proposal explained, ''California's zero-emission-vehicle standards [were] first adopted more than three decades ago'' and its ''greenhouse gas standards were first adopted 16 years ago.'' [227]

Thus, until 2019, the self-executing express preemption provisions in the governing fuel economy statute, Section 32919, had always provided the sole codified language on CAFE preemption. Since this statutory language is self-executing, Federal courts, as well as Federal agencies, states, and local governments, had come to understand the fundamental operation of CAFE preemption and applied it on a case-by-case basis, resulting in the development of a significant body of case law, without the need for any corresponding regulations from NHTSA. As such, the SAFE I Rule was neither the natural evolution of NHTSA's prior positions nor an expected outgrowth of the regulatory landscape. Thus, to the extent this rulemaking is a change in position, it is simply a course correction that returns the Agency's regulations to

[217] Allergy & Asthma Network et al., Docket No. NHTSA–2021–0030–0299 (June 4, 2021).

[218] Connecticut Department of Transportation, Docket No. NHTSA–2021–0030–0330 (June 11, 2021) (pointing to several past policy initiatives to demonstrate that ''[o]ur agencies are working together to find innovative state air quality and transportation solutions to improve air quality and take action on climate change'').

[219] National League of Cities et al., Docket No. NHTSA–2021–0030–0421 (June 11, 2021) (''The Notice of Proposed Rulemaking (NPRM) expresses concern that in labeling 'an entire segment of state and local regulation as preempted,' the SAFE I Rule 'unnecessarily and inappropriately restricts potential policy innovation at the State and local level.' We agree.'').

[220] Zero Emission Transportation Association, Docket No. NHTSA–2021–0030–0397 (June 11, 2021) (''Repealing these regulations is a critical step toward ensuring federal and state GHG vehicle emissions standards can support the rapid transition to electric vehicle production that will spur American manufacturing, innovation, and competitiveness in the global market . . .''); National Coalition for Advanced Transportation, Docket No. NHTSA–2021–0030–0310 (June 11, 2021) (''comes at a critical time when States and local governments are working to reduce harmful GHG and other emissions and many different stakeholders, including NCAT members, are investing in the development and deployment of electric vehicles and related infrastructure across the country''); Edison Electric Institute, Docket No. NHTSA–2021–0030–0396 (June 11, 2021) (''EEI's member companies are in the middle of a profound, long-term transformation in how electricity is generated, transmitted, and used'').

[221] Zero Emission Transportation Association, Docket No. NHTSA–2021–0030–0397 (June 11, 2021); National Coalition for Advanced Transportation, Docket No. NHTSA–2021–0030–0310 (June 11, 2021).

[222] Competitive Enterprise Institute et al., Docket No. NHTSA–2021–0030–0411 (June 11, 2021).

[223] *See, e.g.,* National Automobile Dealers Association, Docket No. NHTSA–2021–0030–0435 (June 10, 2021); Competitive Enterprise Institute et al., Docket No. NHTSA–2021–0030–0411 (June 11, 2021), Urban Air Initiative et al., Docket No. NHTSA–2021–0030–0423 (June 11, 2021).

[224] National Automobile Dealers Association, Docket No. NHTSA–2021–0030–0435 (June 10, 2021).

[225] The wording of this provision was slightly modified in a recodification of EPCA in 1994. Overall though, both contemporaneous legislative sources and courts considering fuel economy matters have stressed that ''the 1994 recodification was intended to ''revise[ ], codif[y], and enact[ ]'' the law ''without substantive change.'' *Green Mountain Chrysler Plymouth Dodge Jeep,* 508 F. Supp. 2d at 346 (quoting Pub. L. 103–272, 108 Stat. 745, 745 (1994); H.R. Rep. No. 103–180, at 1 (1994), reprinted in 1994 U.S.C.C.A.N. 818, 818; S. Rep. No. 103–265, at 1 (1994)).

[226] *Compare Ophir,* 647 F. Supp. 2d at 91–92 (''The Court declares instead that the hybrid requirement of Rule 403 is expressly preempted by the EPCA, and the city and [Police Commissioner] are permanently enjoined from enforcing it.''), *with Cent. Valley Chrysler-Jeep, Inc.,* 529 F. Supp. 2d at 1175 (holding that California's regulation of motor vehicle greenhouse gas emissions were not preempted under Section 32919).

[227] State of California et al., Docket No. NHTSA–2021–0030–0403 (citing Cal. Code Regs. title 13, § 1960.1(g)(2) (1991)).

the same state in which they existed for approximately 44 of the 46 years of EPCA's lifespan prior to the SAFE I Rule.

Commenters that opposed the Proposal argued that this history of regulatory silence is irrelevant, pointing, for instance, to Supreme Court cases upholding agencies who promulgated regulations long after the enactment of the antecedent statutory language.[228] This argument, though, oversimplifies NHTSA's position and the applicable legal standards. The Agency agrees that a statute's long pendency does not foreclose the opportunity to promulgate otherwise appropriate regulations that seek to apply the statute for the first time. But that does not mean the SAFE I Rule's unprecedented departure from longstanding practice is, as commenters contend, ''of little consequence.'' [229] Such comments erroneously reduce the standard into an all-or-nothing proposition: Suggesting the lack of prior regulations must either independently sink the rulemaking or have no bearing on the analysis at all. However, the very same Supreme Court jurisprudence cited by these comments makes clear that the proper inquiry is more nuanced. In particular, the cases emphasize that although ''the mere fact that an agency interpretation contradicts a prior agency position is not fatal,'' such unprecedented diversions must still ''take account of legitimate reliance'' interests connected to the prior positions.[230] Within this more comprehensive framework, the problem with the SAFE I Rule was not simply that it sought to promulgate regulations on Section 32919 for the first time—but that it did so without regard for many of the legally relevant considerations, such as reliance interests, that should have informed whether the Agency should have taken such a broadly applicable view of preemption.

In the Proposal, the Agency expressed concern that the SAFE I Rule improperly neglected to consider the nuances of the federalism interests affected by the rule.[231] The commenting state and local governments subject to such preemption overwhelmingly agreed, commenting that this concern was particularly illustrated by the failure of the SAFE I Rule to account for the state and local jurisdictions' reliance interests in the purportedly preempted programs. Their comments substantiated this claim, pointing to numerous important policy goals or Federal statutory obligations that relied upon those programs. These reliance interests are largely unsurprising, as NHTSA had never previously issued regulations on EPCA preemption for the entirety of the CAFE program up to the point of the SAFE I Rule or had otherwise itself attempted to preempt those programs. Nevertheless, the SAFE I Rule still failed to meaningfully discuss these reliance interests. Instead, the Rule instituted a sweeping prohibition that foreclosed opportunities to more narrowly consider programs in a particularized setting. Consequently, a full repeal of the SAFE I Rule addresses this legal deficit and thereby restores the proper foundation upon which the Agency may more appropriately consider this issue in any future settings.

Finally, NHTSA believes it is worth making clear that repealing the SAFE I Rule does not itself undermine any reliance interests. In this respect, the Agency is mindful that neither states, nor local jurisdictions, the entities potentially subject to any preemption, nor motor vehicle manufacturers, the entities producing the vehicles potentially subject to any state or local regulation, articulated a reliance interest in the SAFE I Rule in their comments to this Proposal.[232] To the contrary, numerous states and local jurisdictions supported the Proposal and expressly clarified that they have not relied on the framework of the SAFE I Rule due to its brief tenure and uncertainty surrounding its legal validity. For example, a comment submitted by the State of California along with a collection of other states and local jurisdictions emphasized that ''no cognizable reliance interests in the Preemption Rule counsel against repeal. Besides being unclear, the Preemption Rule has faced litigation for all but a few hours of its 21-month existence, preventing any reasonable reliance interests from accruing during that time.'' [233] Therefore, other than the reliance interests *restored* by repealing the SAFE I Rule,[234] NHTSA has not identified any reasonable reliance interests that may caution against this rulemaking.

b. The Rigid Framework of the SAFE I Rule Also Left No Room To Account for Other Important Preemption Variables

The substantial federalism and reliance interests discussed above support a narrowly tailored preemption analysis that considers preemption on a particularized basis rather than through sweeping proclamations that categorically eliminate the interests. Addressing EPCA preemption in a more particularized setting also promotes a more thorough and informed preemption assessment of any specific state or local programs at issue. This is because the nature of the EPCA preemption analysis frequently requires an understanding of fact-specific variables or diverse characteristics of the programs in question, such as the relevant technologies, compliance paths, and particular activities pertinent to those programs. Forming abstract or generally applicable EPCA preemption conclusions precludes an understanding of those program-specific attributes and, like the SAFE I Rule, results in a sweeping proclamation that cannot possibly account for the diverse array of programs (some of which likely have not even been formulated yet) potentially affected by the analysis. For instance, in order to announce a generally applicable scope for EPCA preemption, the SAFE I Rule drew assumptions about compliance technologies and program characteristics that would regulate GHG emissions from motor vehicles or involve ZEV mandates in the near-term. In turn, the Rule extrapolated those assumptions to the entire realm of regulatory possibilities, both now and in the future. The SAFE I Rule's rigid and generally applicable scope foreclosed any opportunity to evaluate specific

[228] *See* Urban Air Initiative et al., Docket No. NHTSA–2021–0030–0423 (June 11, 2021) (citing *Smiley* v. *Citibank (S. Dakota), N.A.,* 517 U.S. 735 (1996) (upholding a regulation first promulgated by the Comptroller of the Currency ''more than 100 years after the enactment'' of the statutory language to which it was directed).

[229] National Automobile Dealers Association, Docket No. NHTSA–2021–0030–0435 (June 10, 2021).

[230] *Smiley,* 517 U.S. at 742.

[231] *See* CAFE Preemption NPRM, 86 FR at 25989.

[232] As for automobile manufacturers, three motor vehicle manufacturers, Ford, Tesla, and Rivian, directly commented on the Proposal. Each of these comments expressly supported the Proposal. Ford Motor Company, Docket No. NHTSA–2021–0030–0002 (Apr. 28, 2011) (''Ford supports NHTSA's proposal to restore a ''clean slate'' by repealing the SAFE I rule and preamble statements regarding preemption.''), Tesla, Inc. Docket No. NHTSA–2021–0030–0398 (June 11, 2021) (''Tesla supports NHTSA's proposal and the full repeal of the SAFE Rule Part 1''), Rivian, Docket No. NHTSA–2021–0030–0413 (June 11, 2021) (''Rivian supports NHTSA's conclusion that their portion of the SAFE I rule must be repealed''). Other motor vehicle manufacturers submitted comments through their industry organizations. None of these comments opposed the Proposal either. *See* Zero Emission Transportation Association, Docket No. NHTSA–2021–0030–0397 (June 11, 2021), National Coalition for Advanced Transportation, Docket No. NHTSA–2021–0030–0310 (June 11, 2021), Alliance for Automotive Innovation, Docket No. NHTSA–2021–0030–0400 (June 11, 2021).

[233] State of California et al., Docket No. NHTSA–2021–0030–0403 (June 11, 2021).

[234] *See* National League of Cities et al., Docket No. NHTSA–2021–0030–0421 (June 11, 2021) (noting that a repeal of the SAFE I Rule ''would in turn restore the conditions on which those local governments relied in setting their climate goals.'').

programs based on a comprehensive understanding of their actual characteristics rather than on generalized assumptions about how they operate. This left no space to defer a preemption assessment until the specific programs could be fully understood or consider whether actual differences in programs (both in the near-term or through technological developments that may occur in the future) could affect the application of EPCA's ''related to'' preemption standard.

Numerous commenters also identified multiple other considerations relating to potential state motor vehicle emissions regulations that would be foreclosed for consideration by the sweeping rigidity of the SAFE I Rule. By rigidly restricting policy developments and precluding avenues for innovation, the SAFE I Rule ultimately implemented a rigid and permanent prohibition based on, at most, a limited understanding of a particular snapshot of the regulatory landscape. Comments further underscored a concern that the regulatory landscape upon which the SAFE I Rule imposed is dynamic and evolving. This view was particularly developed in a comment from the South Coast Air Quality Management District, which criticized the SAFE I Rule for neglecting to ''consider how pollution control technology changes over time,'' ''fail[ing] to acknowledge that some technologies may not have any measurable relationship with fuel economy standards at all,'' and ignoring that ''state-set standards may be met by means other than increasing fuel economy.'' [235] Ultimately, such concerns echo the Proposal's misgivings that the SAFE I Rule rigidly applied preemption irrespective of the precise contours and legally relevant characteristics of any particular programs, regulations, or technological developments that may arise. In doing so, the SAFE I Rule instituted an inflexible preemption framework, which necessarily could not accommodate the litany of fact-specific variables and nuances that typically bear upon a preemption analysis, which, the Agency stresses, could still determine that any particular program is preempted. However, preempting all programs that fit within the broad categories established in the SAFE I Rule fails to acknowledge that the specific contours of any particular program remain crucial to the analysis.

A few comments that opposed the Proposal disagreed with this concern, such as a comment from NADA that argued the ''physics and chemistry involved with fuel economy and GHG emissions standards'' are intrinsically intertwined such that a regulation of one regulates the other.[236] In this respect, NADA's comment largely mirrors the reasoning of the SAFE I Rule in preempting all motor vehicle GHG standards. However, as discussed throughout this rulemaking, the Agency here is not taking a generally applicable position on this issue, as NHTSA continues to believe that such statements simply ignore the details of particular programs. Ultimately, such statements make factual determinations about detailed scientific and technical issues in the abstract —without any regard for the actual technical details of the particular programs or technologies that bear upon those specific conclusions. In doing so, such statements of general applicability cannot possibly account for whether variables, which are presently unknown (and some of which may depend upon programs or technologies not even in existence yet), may affect the relevant technical analysis or substantive accuracy of the preemption determination.

Ultimately, if NADA or any other parties oppose the state and local programs that the SAFE I Rule sought to preempt, they remain free to challenge those programs in Federal court, as they have been able to do since the inception of those programs. The repeal of the SAFE I Rule does not change that ability or the underlying ''related to'' standard in Section 32919. To the extent NADA considers this point a process flaw, NHTSA responds that NADA's focus is too narrow, as the Agency has explained above that there exists no need to replace its positions on preemption in the SAFE I Rule with new generally applicable positions. The SAFE I Rule sought to preempt, in a generally applicable manner, all state and local GHG emissions regulations for motor vehicles. Continuing this approach from the SAFE I Rule would improperly only focus upon a snapshot of the regulatory landscape: The *current* manner in which *currently* available technology reduces emissions based. This unduly limited perspective is evident even from the face of such comments, such as a joint comment from CEI asserting that ''[t]he two types of standards will remain mathematically convertible *as long as affordable and practical onboard carbon capture technologies do not exist.*''[237] Therefore, even assuming the framework espoused by the SAFE I Rule and commenters defending the Rule, the relationship between the regulations that would have been preempted under SAFE I Rule and fuel economy still only exists as a potentially impermanent state of affairs, subject to change as technology or legal standards evolve. As such, it was not appropriate for the SAFE I Rule to try and confine these dynamic regulatory subjects to a static and one-size-fits-all prohibition.

In light of the foregoing, upon reconsideration, NHTSA finalizes its view that the SAFE I Rule's categorical scope was an inappropriate approach. The preemption framework established by the Rule necessarily could not account for legally relevant considerations and, in any event, imprudently and unnecessarily imposed preemption in absolute terms, foreclosing any outlet for a more narrowly tailored approach instead and precluding opportunities to account for program-specific variables that could affect the accuracy or nature of a preemption analysis.

iii. Restoring the Focus to the Governing Statutory Language Promotes a Properly Applied EPCA Preemption Framework

In light of the foregoing, NHTSA maintains the Proposal's concern that the Agency's preceding discourse on EPCA preemption paints a circuitous regulatory landscape, which convolutes the proper application of legal principles on important questions of preemption. Such confusion culminated in the SAFE I Rule, which as described throughout herein, misapplied the governing legal principles, articulated an impermissible legal role for the Agency, and failed to identify the legally relevant factors that bore on an EPCA preemption determination. In doing so, the SAFE I Rule also purported to synthesize a variety of Agency statements and positions that predated that rulemaking. And, even though the SAFE I Rule represented a marked departure from the Agency's longstanding historical practice of not codifying express EPCA preemption requirements, the SAFE I Rule (including its preambles that accompanied the rulemaking) still

[235] South Coast Air Quality Management District, Docket No. NHTSA–2021–0030–0446 (June 11, 2021) (supporting such positions through a citation to ''*Green Mountain Chrysler Plymouth Dodge Jeep,* 508 F.Supp. 2d at 381 (discussing meeting GHG standards through preventing leakage of air conditioner refrigerants)'').

[236] National Automobile Dealers Association, Docket No. NHTSA–2021–0030–0435 (June 10, 2021). *See also* Urban Air Initiative et al., Docket No. NHTSA–2021–0030–0423 (June 11, 2021).

[237] Competitive Enterprise Institute et al., Docket No. NHTSA–2021–0030–0411 (June 11, 2021) (emphasis added).

attempted to envelop the Agency's historical discussions of EPCA preemption within its legally problematic preemption framework. Accordingly, NHTSA continues to believe that a repeal of the SAFE I Rule is justified in order to clarify the applicable preemption framework and restore the traditional focus on EPCA's longstanding statutory standards in Section 32919, which ultimately govern the preemption analysis. Moreover, because of the extent to which the SAFE I Rule inextricably comingled its analysis with a variety of prior Agency statements on the subject of EPCA preemption, in repealing the SAFE I Rule, the Agency also stresses that none of those preceding statements should be read as persisting Agency positions on the nature or scope of EPCA preemption. In doing so, NHTSA strives to disentangle any regulatory confusion wrought by the SAFE I Rule from the original statutory standards in Section 32919.

Accordingly, NHTSA is finalizing its proposed approach of refining the discourse on EPCA preemption by repealing the SAFE I Rule. The Agency considers this basis for a repeal applicable regardless of whether NHTSA possessed authority for the SAFE I rulemaking because, either way, the SAFE I Rule introduced confusion that undermined a properly scoped preemption analysis. In this respect, as described before, the Agency remains cognizant that Congress has not required NHTSA to speak substantively on EPCA preemption. Thus, anything NHTSA says on this subject is, at most, elective and unnecessary for Section 32919 to function as Congress intended. Consequently, if NHTSA's regulations on EPCA preemption raise the possibility of confusion or otherwise convolute the discourse on the subject, it would be better to reset those statements entirely than allow them to linger.

a. Repealing the SAFE I Rule Facilitates the Direct Application of Longstanding Statutory Standards

NHTSA finalizes the Proposal's view that a repeal of the SAFE I Rule helpfully elucidates the proper standards to apply when conducting an EPCA preemption analysis. This is not simply because the SAFE I Rule promulgated requirements for which no authority existed, as described above. Even apart from their unsustainable legal status, the SAFE I Rule also introduced entirely new and largely undefined concepts into the preemption analysis. In doing so, the SAFE I Rule diverted attention from the statutory standards of Section 32919, which were traditional standards long applied by regulated entities and courts. By layering additional uncharted and undefined regulatory standards on top of this longstanding statutory language, the SAFE I Rule introduced new uncertainty into the EPCA preemption regulatory landscape. As such, today's repeal of the Rule removes this superfluous layer thereby restoring the focus on the original statutory standards, which are capable of direct application.

On balance, the comments to the Proposal illustrated the degree to which a repeal of the SAFE I Rule promoted a clearer and more direct application of the governing statutory preemption standards. Several commenters opposing a repeal expressed concern that this step would undo what they viewed as the SAFE I Rule's clarification of EPCA preemption. To reach this conclusion, such comments generally argued that by categorically preempting states and local jurisdictions, the SAFE I Rule established a clear brightline for preemption, whereas a repeal would fail to provide any guidance on the subject or potentially result in overlapping requirements.[238]

However, commenters by no means agreed on the proposition that the SAFE I Rule clarified the regulatory landscape. In fact, a large number of commenters supporting a repeal specifically expressed the opposite concern: That the SAFE I Rule introduced more uncertainty. Many of these commenters were states and local entities who especially need to understand the contours of EPCA preemption in order to formulate their own policies and assess their viability. Such commenters pointed to tangible examples of how aspects of the SAFE I Rule convoluted the EPCA preemption analysis by introducing new regulatory requirements and standards that produced more uncertainty than the underlying statutory standards in Section 32919.

Ultimately, NHTSA finalizes the Proposal's view that refocusing the governing preemption spotlight back on Section 32919's statutory terms is ideal because the SAFE I Rule did not elucidate the regulatory landscape, and in some cases, may have even added confusion by introducing unfamiliar and uncharted terms into the preemption analysis. Permitting the regulations of the SAFE I Rule to linger enhances the potential that these regulations may only add regulatory confusion to the statutory standards long in place under EPCA. As described throughout this final rule, EPCA preemption is governed by the express preemption provision in Section 32919, which has employed substantially the same language throughout the history of the CAFE program. Multiple commenters noted that the ''related to'' language enacted in Section 32919 has also been used by Congress in other enactments beyond EPCA and has the benefit of extensive jurisprudence analyzing the meaning of the term.[239] Moreover, Section 32919 itself has even been applied by several Federal courts, who have applied the provision to both preempt and not preempt state and local programs.[240] Therefore, the governing statutory standards in Section 32919 are familiar concepts that the public, including regulated entities, and adjudicators have frequently analyzed or considered over the span of EPCA's many years of existence.

In contrast, the unprecedented approach of the SAFE I Rule confused this framework and, as described above, purported to introduce new prescriptive standards into the preemption analysis by way of the codified regulations. The SAFE I Rule substituted this long-applied statutory standard for new regulatory phrases that lacked any jurisprudential history or further definition. The resulting ambiguity introduced many unknowns into the EPCA preemption landscape, such as what those new standards mean or how NHTSA may seek to construe its new standards in the future. In addition, because Section 32919 can also support a private right of action, in the past, private parties have undertaken litigation seeking to enforce the terms of EPCA preemption. As such, any new

[238] *See, e.g.,* National Automobile Dealers Association, Docket No. NHTSA–2021–0030–0435 (June 10, 2021), Competitive Enterprise Institute et al., Docket No. NHTSA–2021–0030–0411 (June 11, 2021), American Fuel & Petrochemical Manufacturers, Docket No. NHTSA–2021–0030–0425 (June 11, 2021), Urban Air Initiative et al., Docket No. NHTSA–2021–0030–0423 (June 11, 2021).

[239] In fact, this point was emphasized even by commenters critical of the Proposal, as they sought to raise substantive arguments about how various state programs were preempted by EPCA under the ''related to'' standard. *See, e.g.,* Urban Air Initiative et al., Docket No. NHTSA–2021–0030–0423 (June 11, 2021) (seeking to apply Section 32919's ''related to'' terminology by reference to other jurisprudence interpreting similar language).

[240] *Compare Ophir,* 647 F. Supp. 2d at 91–92 (''The Court declares instead that the hybrid requirement of Rule 403 is expressly preempted by the EPCA, and the city and [Police Commissioner] are permanently enjoined from enforcing it.''), *with Cent. Valley Chrysler-Jeep, Inc.,* 529 F. Supp. 2d at 1175 (holding that California's regulation of motor vehicle greenhouse gas emissions were not preempted under Section 32919).

and potentially malleable standards promulgated by the SAFE I Rule also offer new opportunities for private litigants to advocate for novel applications of the SAFE I Rule's prescriptive preemption requirements in contexts even beyond the scope originally contemplated by the Agency. These factors introduce substantial uncertainties into a regulatory landscape that, before the SAFE I Rule, had been exclusively governed by the longstanding statutory language in Section 32919.

Many of the comments raised concerns associated with such uncertainties. For instance, a joint comment submitted by California along with numerous other states and local jurisdictions expressed concern that the new regulations from the SAFE I Rule introduced new—and undefined—legal standards into the preemption framework, pointing to new concepts or phrases such as ''direct or substantial effect'' or ''in-use'' regulations.[241] Commenting states and local jurisdictions also feared that all of these unknowns actually complicated their long-term planning by making the EPCA preemption standard unpredictable.[242] For example, a group of municipal entities expressed uncertainty over whether these untested standards could even be stretched to apply to routine traffic measures in the future.[243] And another local jurisdiction noted that the ensuing litigation over the SAFE I Rule's validity introduced further disruptions into anticipated regulatory initiatives that were already in the process of development upon the promulgation of the Rule.[244] Ultimately, all of these comments underscore the Proposal's concern that the SAFE I Rule did not even achieve the clarity that it cited so frequently as the reason for the rulemaking. In fact, strong indications exist that the Rule actually amplified any ambiguities surrounding EPCA preemption by suddenly linking the preemption analysis to uncharted standards and unfamiliar concepts. As such, even setting aside the litany of other legal problems with the Rule discussed throughout this rulemaking, NHTSA views this repeal as a necessary and prudent step to unclutter the EPCA regulatory landscape.

Other aspects of the SAFE I Rule's regulatory text exacerbated the uncertainty surrounding the SAFE I Rule's unprecedented preemption framework. For instance, the Proposal highlighted that the codified text of the SAFE I Rule was potentially perplexing because Sections 531.7 and 533.7 merely parroted the statutory text in Section 32919. As such, the Proposal expressed a concern that the verbatim recitation of the statutory language in the CFR could even be confusing to some, who assume some subtle difference must exist in the statutory and regulatory provisions. One commenter defending the SAFE I Rule rejected this reasoning, arguing that ''such concerns would be immediately dispelled upon comparing the statutory and regulatory text and realizing the provisions were identical.''[245] The comment assumed this alignment would be naturally understood because the commenter asserted that ''agencies routinely'' parrot their statutes in such a manner.[246] But this assumption is not shared by all, with at least one prominent administrative law treatise expressly recognizing that ''agencies rarely issue legislative rules that simply repeat the precise language of a statute.''[247] Agencies may often integrate portions of statutory language into their regulations, but to fully copy an entire statutory provision into their own regulations is a step further (and a step that the Supreme Court discourages, at least with regard to deference).[248] In this respect, the oddity of codifying into regulation multiple provisions that already exist verbatim and in full in a statute creates a peculiar regulatory maze for statutory standards otherwise capable of direct implementation. As one joint comment noted, the uncertain purpose of taking this superfluous step was exacerbated by the SAFE I ''Rule's preamble [which] magnified the risk of confusion by stating that verbatim recitation of Section 32919 in the Code of Federal Regulations 'articulates NHTSA's views on the meaning' of that section.''[249] This approach sends readers on a search for meaning, straining to find differences between the statute and their mirroring regulatory provisions or perhaps attempting to apply some sort of extra-textual analysis to construe one iteration of the text differently than the other. And even if, as AFPM's comment hypothesizes, a thoughtful reader may eventually reach the conclusion that no such differences actually exist because the provisions are identical, the entire circuitous endeavor serves no purpose because the statutory text already controlled the analysis and its regulatory copies do nothing to further illuminate that analysis.

In any event, whether or not such a parroting regulation is actually confusing need not be dispositive because, at the very least, such a parroting regulation is superfluous and unnecessary. As such, it is not unreasonable for NHTSA to conclude that the superfluous and potentially confusing provisions in Sections 531.7 and 533.7 should no longer remain codified and if they were to remain so, would only overcomplicate the EPCA preemption analysis. Accordingly, NHTSA finalizes its view that a repeal of the SAFE I Rule is independently warranted in order to restore the focus to EPCA's governing statutory standards and remove an unnecessary and potentially confusing layer of regulatory haze that risks obscuring the proper preemption analysis.

b. NHTSA Reiterates That Prior Regulatory Statements on the Scope and Nature of EPCA Preemption No Longer Remain Current Views of the Agency

Finally, NHTSA reiterates the Proposal's view that, to the extent prior rulemaking statements from the Agency discuss matters of EPCA preemption, they should not be read inconsistently with the reconsidered views that NHTSA now expresses in this final rule. Throughout the SAFE I rulemaking, NHTSA sought to portray the

[241] State of California et al., Docket No. NHTSA–2021–0030–0403 (June 11, 2021).

[242] South Coast Air Quality Management District, Docket No. NHTSA–2021–0030–0446 (June 11, 2021) (''the Preemption Rule suffered from a notable lack of clarity and an incomplete analysis of standards. As the Proposed Repeal notes, the Preemption Rule inconsistently used language between the preamble and codified text, creating the risk of confusion as to the full scope of preemption being promulgated.''). *See also* Connecticut Department of Transportation, Docket No. NHTSA–2021–0030–0330 (June 11, 2021) (stressing that a ''repeal is necessary to provide certainty for transportation and air quality planning agencies, the public, and the original equipment manufacturers.'').

[243] National League of Cities et al., Docket No. NHTSA–2021–0030–0421 (June 11, 2021).

[244] District of Columbia Department of Energy and Environment, Docket No. NHTSA–2021–0030–0412 (June 11, 2021) (noting that ''the promulgation of SAFE I threw [the District's] process into turmoil.''). *See also* CAFE Preemption NPRM, 86 FR at 25984 (noting that ''The litigation has substantially divided the regulated industry and interested stakeholders, as the D.C. Circuit litigation encompasses ten consolidated petitions brought by a number of states, cities, and environmental organizations challenging the rule. On the other side of the litigation, several automakers, other states, and fuel and petrochemical manufacturers have intervened in support of the rule.'').

[245] American Fuel & Petrochemical Manufacturers, Docket No. NHTSA–2021–0030–0425 (June 11, 2021).

[246] *Id.*

[247] Richard J. Pierce, Jr. & Kristin E. Hickman, Administrative Law Treatise § 3.8 (6th Edition, 2020–1 Cum. Supp.).

[248] *See Gonzales* v. *Oregon,* 546 U.S. 243, 257 (2006) (refusing to extend deference to an agency regulation that merely parroted a statute).

[249] Center for Biological Diversity et al., Docket No. NHTSA–2021–0030–0369 (June 11, 2021) (quoting 84 FR at 51319).

regulations as the culmination of the Agency's historical discourse on the subject of EPCA preemption. To be sure, as has been reiterated throughout this final rule, NHTSA does not view the SAFE I Rule as a natural or consistent outgrowth of its historical position of not promulgating preemption regulations under Section 32919. Nevertheless, the degree to which the SAFE I Rule sought to emmesh the Agency's prior discussions of EPCA preemption, which appeared occasionally in preambles to substantive CAFE standard-setting rulemakings, within the flawed rationale of the SAFE I Rule warrants a clarification of the relationship of those prior statements to today's repeal.

In this respect, NHTSA fully agrees with several commenters who expressed that this clarification is not formally necessary because this final rule clearly contains the current views of the Agency and upon the repeal of the SAFE I Rule, ''any preambular statements justifying or explaining the Preemption Rule's regulatory provisions or appendices will be a 'legal nullity.' '' [250] NHTSA likewise agrees that this portion of the rulemaking is not a separate final agency action. Any such statements or discussions in the SAFE I rulemaking preambles simply accompanied the SAFE I regulations so upon the repeal of those regulations there is nothing further to formally undo. Likewise, NHTSA is not formally repealing any statements that preceded the SAFE I Rule in the sense that NHTSA is suggesting that the statements will be somehow stricken from past **Federal Register** publications (nor is the Agency even aware of a legal mechanism to do so).[251] But it is precisely because those statements will remain published that NHTSA considers it prudent to, out of an abundance of caution, make crystal clear that they should not be read in isolation or taken out of context as views NHTSA continues to endorse.

Therefore, to the extent the Proposal referred to this clarification as a ''repeal'' or ''clean slate,'' the Agency simply means that any statements NHTSA has made in past rulemaking discussions (in the SAFE I Rule or otherwise) that seek to impose a scope for EPCA preemption or suggest NHTSA has the authority to do so should no longer be read as current NHTSA positions.[252] In other words, no one should attempt to overly parse NHTSA's prior statements in order to argue, for example, that NHTSA somehow left a portion of the SAFE I Rule analysis untouched and continues to hold those views. NHTSA continues to consider this precautionary step worthwhile. In doing so, NHTSA makes clear that no prior statements should continue to clutter the EPCA preemption analysis. This promotes a clearer and more precise discourse on EPCA preemption, which is easier to follow because of the manner in which the SAFE I Rule's preambulatory discussion of EPCA preemption comingled core legal concepts and purported to draw from prior Agency positions. As explained in the preceding section, the SAFE I Rule was repeatedly imprecise in the way it described several fundamental legal principles, such as rulemaking authority, the nature of preemption, and the effect of regulations. This results in a legally confusing discussion about how EPCA preemption operates, how the legal framework should apply, and how NHTSA's views on preemption should factor into any such analysis. Irrespective of the substantive conclusions reached through such a rulemaking, this confusing landscape created by the SAFE I rulemaking record unnecessarily convolutes the EPCA preemption discourse and provides a difficult legal footprint for any members of the public or adjudicatory body to follow. Accordingly, renewing the focus on Section 32919's original language through this final rule restores a more direct and straightforward application of EPCA's familiar and longstanding statutory preemption terms.

III. Rulemaking Analyses and Notices

1. Executive Order 12866, Executive Order 13563, and DOT Regulatory Policies and Procedures

NHTSA has considered the impact of this rulemaking action under Executive Order 12866, Executive Order 13563, and the Department of Transportation's regulatory policies and procedures. Only one commenter raised any of these issues during the comment process. This commenter argued that the Proposal conflicted with Executive Order 12866 because the NPRM ''failed to evaluate whether the action is a significant regulatory action.'' [253] However, this comment is not correct, as this rulemaking document has been considered a ''significant regulatory action'' under Executive Order 12866, but has not been designated as ''economically significant,'' as it would not directly reinstate any state programs or otherwise affect the self-executing statutory preemption framework in 49 U.S.C. 32919.

The same commenter also argued that NHTSA failed to comply with Executive Order 12866 because the Proposal did not ''assess all costs and benefits of its proposed action and available regulatory alternatives.'' [254] The Agency addressed this comment in Section II.A. of this notice.

2. Executive Order 13990

Executive Order 13990, ''Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis'' (86 FR 7037, Jan. 25, 2021), directed the immediate review of ''The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program,'' 84 FR 51310 (September 27, 2019), by April 2021.'' The Proposal followed the review directed in this Executive Order and this Final Rule concludes the review. As noted in the Proposal and reiterated again today, the Agency continues to deliberate further about the complex substantive issues surrounding EPCA preemption and may elect to undertake further action in the future, if warranted, to exercise NHTSA's interpretative and policymaking discretion with respect to such issues. Nevertheless, as the Agency's review under Executive Order 13990 identified other independent and dispositive problems with the SAFE I Rule, these grounds suffice for NHTSA to conclude its reconsideration of the Rule by repealing the SAFE I Rule in full.

3. Executive Order 14008

Executive Order 14008, ''Tackling the Climate Crisis at Home and Abroad'' (86 FR 7619) expressly recognizes that ''[t]he United States and the world face a profound climate crisis.'' Accordingly, the Order describes a multitude of

[250] State of California et al., Docket No. NHTSA–2021–0030–0403 (June 11, 2021) (quoting *NRDC* v. *EPA,* 559 F.3d 561, 565 (D.C. Cir. 2009)); Center for Biological Diversity et al., Docket No. NHTSA–2021–0030–0369 (June 11, 2021).

[251] In this respect, NHTSA particularly disagrees with commenters opposing the Proposal who mischaracterize the nature of the Agency's action in order to label the rulemaking ''retroactive censorship'' or ''regulatory cancel culture.'' *See* Competitive Enterprise Institute et al., Docket No. NHTSA–2021–0030–0411 (June 11, 2021).

[252] In addition to the SAFE I Rule, the Proposal specifically identified several other Preamble statements as containing such statements: DOT, NHTSA, Light Truck Average Fuel Economy Standards Model Years 2005–07, Final Rule, 68 FR 16868, 16895 (Apr. 7, 2003) (describing NHTSA's views on EPCA preemption in the preamble to a final rule setting CAFE standards); DOT, NHTSA, Average Fuel Economy Standards for Light Trucks Model Years 2008–2011; Final Rule, 71 FR 17566, 17654 (Apr. 6, 2006) (describing NHTSA's views of EPCA preemption in the preamble to a final rule setting CAFE standards).

[253] American Fuel & Petrochemical Manufacturers, Docket No. NHTSA–2021–0030–0425 (June 11, 2021).

[254] *Id.*

domestic and foreign policy measures designed to promote ''climate considerations'' as ''an essential element of United States foreign policy and national security.'' [255]

One commenter opposing the Proposal and defending the SAFE I Rule argued that by repealing the SAFE I Rule without a technical analysis of any impacts of state electric vehicle mandates on ''low-income car buyers,'' NHTSA failed to comply with the environmental justice provisions of Executive Order 14008.[256] In response, first and foremost, the Agency stresses that the substantive climate considerations described in the Order do not change the principally legal justifications for the repeal of the SAFE I Rule. As described throughout this Final Rule, a repeal of the SAFE I Rule is necessitated by the multiple legal deficits with the Rule, including a lack of NHTSA rulemaking authority and the Agency's failure to adequately consider legally relevant considerations prior to promulgating the preemption regulations. These legal problems leave the Agency with no discretion but to repeal the Rule.

Moreover, NHTSA notes that both the nature and application of this rulemaking are consistent with the climate and environmental justice goals expressed in Executive Order 14008. While NHTSA's repeal does not depend upon substantive issues, as described throughout, the Agency notes that commenters delving into the substantive issues surrounding the SAFE I Rule widely viewed the original rule as undermining efforts to ''address[ ] climate change and improv[e] equity.'' [257] Moreover, as explained in Section II.B.ii. above, repealing the SAFE I Rule enables any future preemption analyses to occur at a more nuanced level compared to the categorical and rigid prohibition instituted by the repealed regulations. In this sense, repealing the SAFE I Rule facilitates future opportunities to better incorporate climate and environmental justice considerations into future substantive applications or interpretations of EPCA preemption.

Finally, Executive Order 14008 makes clear that pursuing environmental justice often entails understanding policies from the perspective of local communities, ''to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities'' from those policies.[258] This rulemaking has repeatedly described the extent to which repealing the SAFE I Rule will remove improper restrictions on states and local jurisdictions, thereby facilitating their development of innovative policies tailored to address the challenges facing their local communities.[259] In doing so, repealing the SAFE I Rule increases the potential that environmental justice may be served as those jurisdictions are often in the best situation to both quickly identify the unique challenges facing disadvantaged local communities and understand the steps necessary to mitigate them.

4. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of proposed rulemaking or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.,* small businesses, small organizations, and small governmental jurisdictions). No regulatory flexibility analysis is required, however, if the head of an agency certifies the proposal will not have a significant economic impact on a substantial number of small entities.

NHTSA has considered the impacts of this document under the Regulatory Flexibility Act and certifies that this rulemaking will not have a significant economic impact on a substantial number of small entities. The following provides the factual basis for this certification under 5 U.S.C. 605(b). This final rule only concerns the question of preemption; the action does not set CAFE or emissions standards themselves. The preemption regulations repealed in this action have no direct effect on any private entities, regardless of size, because the rules do not regulate private entities. Further, unlike the SAFE I Rule, this rulemaking takes no position on whether any particular State or local law is preempted and has no impact, let alone a significant impact, on any small government jurisdiction. Thus, NHTSA confirms in this final rule that this rule would have no significant impact on any small entities.

5. Executive Order 13132 (Federalism)

Executive Order 13132 requires NHTSA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' [260] ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' [261] Executive Order 13132 imposes additional consultation requirements on two types of regulations that have federalism implications: (1) A regulation that imposes substantial direct compliance costs, and that is not required by statute; and (2) a regulation that preempts State law.[262]

While this final rule concerns matters of preemption, it does not entail either type of regulation covered by Executive Order 13132's consultation requirements. Rather, the action in this final rule merely repeals regulations and positions that sought to preempt State law. Thus, this final rule does not implicate the consultation procedures that Executive Order 13132 imposes on agency regulations that would either preempt state law or impose substantial direct compliance costs on states.

6. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995, Public Law 104–4, requires agencies to prepare a written assessment of the cost, benefits and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually. Because this rulemaking does not include a Federal mandate, no unfunded mandate assessment was prepared.

7. National Environmental Policy Act

The National Environmental Policy Act of 1969) [263] directs that Federal agencies proposing ''major Federal actions significantly affecting the quality of the human environment'' must, ''to the fullest extent possible,'' prepare ''a detailed statement'' on the environmental impacts of the proposed

[255] *Id.*

[256] *See* American Fuel & Petrochemical Manufacturers, Docket No. NHTSA–2021–0030–0425 (June 11, 2021).

[257] *See, e.g.,* Consumer Reports, Docket No. NHTSA–2021–0030–0224 (June 11, 2021).

[258] Executive Order 14008, *Tackling the Climate Crisis at Home and Abroad,* 86 FR 7619 (Feb. 1, 2021).

[259] *See supra* nn.216–217 (describing commenters who specifically raised environmental justice concerns connected to this very issue).

[260] Executive Order 13132, *Federalism,* Sec. 1(a) (Aug. 4, 1999).

[261] *Id.* at Sec. 1(a).

[262] *Id.* at Sec. 6(b), (c).

[263] 42 U.S.C. 4321–4347.

action (including alternatives to the proposed action).[264] However, there are some instances where NEPA does not apply to a particular proposed action.

In the Proposal, NHTSA emphasized that one consideration is whether the action is a non-discretionary action to which NEPA may not apply.[265] In this Final Rule, NHTSA has concluded that the SAFE I Rule was legally flawed for several reasons. Principally, Congress did not provide legislative rulemaking authority to the Agency with regard to 49 U.S.C. 32919. To the extent that the SAFE I Rule purported to dictate or proclaim EPCA preemption with the force of law, the Agency determined through this rulemaking that such actions exceed the Congressional grant of authority to NHTSA under EPCA. Accordingly, the Agency believes that the only legally appropriate course of action is to realign its regulatory activities to their properly authorized scope by removing the regulatory language and appendices from the Code of Federal Regulations and repealing the corresponding analysis of particular state programs in the SAFE I Rule. In addition, this Final Rule concluded that the SAFE I Rule failed to adequately consider a litany of context-dependent variables that bear upon the preemption analysis—including legally relevant considerations such as the longstanding reliance interests undermined by the preemption imposed by the SAFE I Rule. Overlooking these considerations also renders the SAFE I Rule legally invalid and in need of repeal. Courts have long held that NEPA does not apply to nondiscretionary actions by Federal agencies.[266] Based on the conclusion in this final rule that the legal deficits in the SAFE I Rule compel the Agency to repeal it, NHTSA maintains the position that NEPA does not apply to this action.

This is consistent with the position described in the Proposal, which also considered NEPA inapplicable due to the legally required nature of the repeal. Only two comments even raised NEPA issues, with one supporting the Agency's position and the other challenging it. Notably, the supporting comment was submitted on behalf of twelve public interest organizations, many of which consisted of environmental interest organizations. This joint comment expressly agreed with NHTSA that ''if NHTSA definitively concludes that the Preemption Rule exceeds its statutory authority, it need not analyze the environmental impacts of a repeal under the National Environmental Policy Act.'' [267] This comment further recognized that since the Agency's repeal is compelled by law, any attendant NEPA evaluation is unnecessary because ''the agency 'lacks the power to act on whatever information' it might gather in a NEPA analysis.'' [268] This matches the framework described in this Final Rule.

The sole comment opposing the Proposal's approach to NEPA was a joint comment submitted by the Urban Air Initiative. This comment argued that a repeal of the SAFE I Rule was a major action that required an environmental impact statement.[269] In support of this argument, the comment tried to link the rulemaking to a variety of environmental impacts, such as changes to motor vehicle fuel economy from increased battery pack weight, as well as toxicity from electric automobile batteries.[270] However, even this comment predicates NHTSA's NEPA obligation on the rulemaking qualifying ''as a discretionary action.'' [271] As described throughout this final rule, NHTSA's repeal of the SAFE I Rule is nondiscretionary due to the need to remedy the legal deficits with the Rule. Nothing in this comment changes this traditional understanding of NEPA's operation. Moreover, in labeling this repeal an action subject to NEPA, these commenters fail to explain why this conclusion, if true, would not also apply to the SAFE I Rule, which is what originally set in motion such a sweeping preemption scope. In doing so, the comment strenuously defends the viability of the SAFE I Rule without recognizing that this very same argument would render the SAFE I Rule violative of NEPA and only provide another reason that the Rule is legally invalid and in need of repeal.[272]

Moreover, as in the Proposal, the Agency also reiterates that the Supreme Court has characterized an express preemption statute's scope as a legal matter of statutory construction, in which ''the purpose of Congress is the ultimate touchstone of pre-emption analysis.'' [273] In turn, ''Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it.'' [274] This particularly applies ''[i]f the statute contains an express pre-emption clause[. Then] the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.'' [275]

In light of this background, as both this rulemaking and the SAFE I Rule itself consistently made clear, the statutory text of Section 32919 ultimately governs express preemption through self-executing terms. The SAFE I Rule even relied on this to conclude that NEPA was not required for that rulemaking because NHTSA could not change the scope of EPCA preemption. As described in this rulemaking, the SAFE I Rule was confused and contradictory in this respect because, *if valid,* the regulations codified by the SAFE I Rule would have actually imposed prescriptive preemption requirements. Nevertheless, the SAFE I Rule still accurately assessed that under a properly scoped application of Section 32919, preemption ''is not the result of the exercise of Agency discretion, but rather reflects the operation and application of the Federal statute.'' [276]

The express preemption provision of Section 32919 remains enacted, in full and unchanged, irrespective of the SAFE I Rule or this final rule. As almost all commenters agreed, this provision is self-executing and governing of the EPCA preemption issue irrespective of any Agency regulations that purport to do so as well. Therefore, in repealing the SAFE I Rule, NHTSA is not actually

[264] 42 U.S.C. 4332.

[265] *See Dept. of Transp.* v. *Public Citizen,* 541 U.S. 752, 768–69 (2014) (holding that the agency need not prepare an environmental impact statement (EIS) in addition to an environmental assessment (EA) and stating, ''Since FMCSA has no ability categorically to prevent the cross-border operations of Mexican motor carriers, the environmental impact of the cross-border operations would have no effect on FMCSA's decisionmaking—FMCSA simply lacks the power to act on whatever information might be contained in the EIS.'').

[266] *See, e.g., Public Citizen,* 541 U.S. 752; *Milo Cmty. Hosp.* v. *Weinberger,* 525 F.2d 144 (1st Cir. 1975); *State of South Dakota* v. *Andrus,* 614 F.2d 1190 (8th Cir. 1980); *Citizens Against Rails-to-Trails* v. *Surface Transp. Bd.,* 267 F.3d 1144 (D.C. Cir. 2001); *Sierra Club* v. *Babbitt,* 65 F.3d 1502 (9th Cir. 1995).

[267] Center for Biological Diversity et al., Docket No. NHTSA–2021–0030–0369 (June 11, 2021).

[268] *Id.* (quoting *Public Citizen,* 541 U.S. at 768–69).

[269] Urban Air Initiative et al., Docket No. NHTSA–2021–0030–0423 (June 11, 2021).

[270] *Id.*

[271] *Id.*

[272] The Proposal recognized the potential for this contradiction as well, noting that if NHTSA did, in fact, have authority to establish the scope of preemption with the force and effect of law, and if the Agency inappropriately failed to incorporate environmental considerations into its decision in the SAFE I Rule, then a repeal which restores the scope to the *status quo ante* would rectify this overstep.

[273] *Cipollone* v. *Liggett Grp., Inc.,* 505 U.S. 504, 516 (1992).

[274] *Lohr,* 518 U.S. at 485–86 (plurality opinion).

[275] *CSX Transp., Inc.,* 507 U.S. at 664.

[276] NHTSA, EPA, The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, Final Rule, 84 FR 51310, 51353–54 (Sept. 27, 2019).

changing the scope of EPCA preemption. To be sure, a repeal will remove the SAFE I Rule, which facially imposed binding requirements. But those requirements themselves were invalid because NHTSA's regulations were never capable of modifying the scope of EPCA's self-executing terms, even if they purported to do so. Accordingly, under Section 32919's constant language, the actual scope of EPCA preemption is the same today as it was yesterday when the regulations remained codified, as well as the same as it was in 2018 before those rules were ever promulgated. Therefore, this final rule likewise does not change the statutorily set scope of express preemption and, as such, the Agency does not consider this rule to result in any environmental impact that may arise from such preemption.[277]

8. Executive Order 12988 (Civil Justice Reform)

Pursuant to Executive Order 12988, ''Civil Justice Reform,'' [278] NHTSA has determined that this final rule does not have any retroactive effect.

9. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980, NHTSA states that there are no requirements for information collection associated with this rulemaking action.

10. Privacy Act

In accordance with 5 U.S.C. 553(c), NHTSA solicited comments from the public to better inform the rulemaking process. These comments are posted, without edit, to *www.regulations.gov,* as described in DOT's system of records notice, DOT/ALL–14 FDMS, accessible through *www.transportation.gov/privacy*.

11. Congressional Review Act

Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996, also known as the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this action as not a ''major rule,'' as defined by 5 U.S.C. 804(2). NHTSA will submit a rule report to each House of the Congress and to the Comptroller General of the United States.

List of Subjects in 49 CFR Parts 531 and 533

Fuel economy.

Regulatory Text

For the reasons stated in the preamble, the National Highway Traffic Safety Administration amends 49 CFR parts 531 and 533 as set forth below.

PART 531—PASSENGER AUTOMOBILE AVERAGE FUEL ECONOMY STANDARDS

■ 1. The authority citation for part 531 continues to read as follows:

Authority: 49 U.S.C. 32902; delegation of authority at 49 CFR 1.95.

§ 531.7 [Removed]

■ 2. Remove § 531.7.

Appendix B [Removed]

■ 3. Remove appendix B to part 531.

PART 533—LIGHT TRUCK FUEL ECONOMY STANDARDS

■ 4. The authority citation for part 533 continues to read as follows:

Authority: 49 U.S.C. 32902; delegation of authority at 49 CFR 1.95.

§ 533.7 [Removed]

■ 5. Remove § 533.7.

Appendix B [Removed]

■ 6. Remove appendix B to part 533.

Issued on December 21, 2021, in Washington, DC, under authority delegated in 49 CFR 1.81, 1.95, and 501.5.

Steven S. Cliff,

Deputy Administrator.

[FR Doc. 2021–28115 Filed 12–22–21; 4:15 pm]

BILLING CODE 4910–59–P

[277] This view was also expressly supported by commenting public interest organizations. *See* Center for Biological Diversity et al., Docket No. NHTSA–2021–0030–0369 (June 11, 2021).

[278] 61 FR 4729 (Feb. 7, 1996).

FEDERAL REGISTER

Vol. 86 Wednesday,

No. 247 December 29, 2021

Part III

Department of Transportation

National Highway Traffic Safety Administration

49 CFR Part 571

Federal Motor Vehicle Safety Standards; Bus Rollover Structural Integrity; Final Rule

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. NHTSA–2021–0088]

RIN 2127–AK96

Federal Motor Vehicle Safety Standards; Bus Rollover Structural Integrity

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: NHTSA is issuing this final rule to establish Federal Motor Vehicle Safety Standard (FMVSS) No. 227, ''Bus rollover structural integrity,'' to enhance the rollover structural integrity of over-the-road buses (motorcoaches), and other buses with a gross vehicle weight rating (GVWR) greater than 11,793 kilograms (kg) (26,000 pounds (lb)). This final rule, issued pursuant to the Moving Ahead for Progress in the 21st Century Act (MAP–21), requires the buses to provide a ''survival space'' in a rollover test to protect occupants from possible collapse of the bus structure around them. In addition, to reduce the likelihood of ejection, this final rule prohibits emergency exits from opening in the rollover test. This final rule ensures that bus roofs and side wall panels will resist deformation and intrusion into the occupant space in rollover crashes, and reduces the risk of emergency exits becoming ejection portals in a crash.

DATES: The effective date of this final rule is: December 30, 2024. Optional early compliance is permitted.

Petitions for reconsideration: Petitions for reconsideration of this final rule must be received not later than February 14, 2022.

ADDRESSES: Petitions for reconsideration of this final rule must refer to the docket number set forth above and be submitted to the Administrator, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590. Note that all petitions received will be posted without change to *https://www.regulations.gov*, including any personal information provided.

Privacy Act: Please see the Privacy Act heading under Rulemaking Analyses and Notices.

FOR FURTHER INFORMATION CONTACT: For non-legal issues, you may contact James Myers, NHTSA Office of Crashworthiness Standards, telephone 202–493–0031, fax 202–493–2990. For legal issues: Deirdre Fujita, NHTSA Office of Chief Counsel, telephone 202–366–2992, fax 202–366–3820. Address: National Highway Traffic Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Washington, DC 20590.

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I. Executive Summary

a. Introduction

This final rule substantially improves motorcoach safety. It establishes an FMVSS to improve the resistance of motorcoach roofs and side wall panels to deformation and intrusion into the occupant compartment in rollover crashes, and fulfills a mandate in section 32703(b)(1) of MAP–21. This final rule also accords with section 32703(b)(2) of MAP–21 by requiring emergency exits to remain closed in a rollover to prevent partial and complete ejection of passengers.

This final rule achieves longstanding NHTSA and Departmental goals to enhance motorcoach safety. NHTSA identified four priority areas in which to improve the safety of motorcoaches and other large buses: Requiring passenger seat belts, improved rollover structural integrity, improved emergency evacuation, and fire safety.[1] With this final rule, NHTSA has completed research and rulemaking on the first two priority areas and completed research on the other two.

Congress also focused on these and other areas in incorporating the Motorcoach Enhanced Safety Act of 2012 into MAP–21 (Pub. L. 112–141). Among other matters, MAP–21 directed NHTSA (as delegated by the Secretary of Transportation) to require seat belts in ''motorcoaches,'' a term, Congress stated, that has the same meaning given the term ''over-the-road bus'' in section 3038(a)(3) of the Transportation Equity Act for the 21st Century (49 U.S.C. 5310 note). An over-the-road bus (OTRB) is a bus characterized by an elevated passenger deck located over a baggage compartment.[2] NHTSA has used the term ''over-the-road bus'' in the FMVSSs issued pursuant to the MAP–21 mandates. For example, NHTSA fulfilled MAP–21's seat belt mandate by amending FMVSS No. 208, ''Occupant crash protection,'' to require seat belts in each passenger seating position in OTRBs, as well as in other buses that are not OTRBs (non-OTRBs) with a GVWR greater than 11,793 kg (26,000 lb).[3] (For the convenience of the reader, NHTSA uses the term ''large buses'' in this final rule to refer to OTRBs regardless of GVWR and non-OTRBs with a GVWR

[1] *See* ''NHTSA's Approach to Motorcoach Safety,'' Docket No. NHTSA–2007–28793. In NHTSA's plan, ''motorcoach'' referred to inter-city transport buses. In 2009, DOT also issued a Motorcoach Safety Action Plan that addressed additional factors, such as driver fatigue and operator maintenance schedules. An update to the Departmental plan was issued in December 2012, *https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/Motorcoach-Safety-Action-Plan-2012.pdf.* This final rule is an action included in the Departmental plan.

[2] Under section 32701(6) of the Motorcoach Enhanced Safety Act, ''motorcoach'' does not include a bus used in public transportation provided by, or on behalf of, a public transportation agency, or a school bus.

[3] 78 FR 70416, November 25, 2013; denial of petitions for reconsideration, 81 FR 19902, April 6, 2016.

greater than 11,793 kg (26,000 lb), with some exceptions.)

Section 32703(b)(1) of MAP–21 also directed NHTSA to pursue rulemaking for OTRBs to establish improved roof and roof support standards that substantially improve the resistance of bus roofs to deformation and intrusion in rollovers. MAP–21 requires NHTSA to adopt a final rule if NHTSA determines that such standards meet the requirements and considerations in subsections (a) and (b) of section 30111 of the National Traffic and Motor Vehicle Safety Act.[4] As discussed in this final rule, NHTSA has made such a determination regarding an FMVSS for all large buses.

This final rule complements the November 2013 seat belt rule. With all new large buses manufactured since 2016 required to have lap and shoulder seat belts for passengers, increasing numbers of passengers can be belted. This final rule establishing FMVSS No. 227 will ensure that these belted passengers will be significantly protected against unreasonable risk of injury in frontal crashes and significantly protected against the risk of ejection in rollovers. Hand-in-hand with the seat belt rule, this final rule enhances the safety of these belted passengers by providing a ''survival space'' in a rollover, a space where the belted occupants are protected from intruding structures such as a collapsing roof or a detached luggage rack. The new standard's improvements to the roof and sidewall strength of the buses will also protect unbelted occupants against structural failure of the bus compartment. This final rule improves transportation safety for the most vulnerable in our society since more than half of motorcoach trips are made by children and senior citizens.[5] It furthers transportation equity by providing the same occupant crash protection to these passengers as the protection provided to occupants of other passenger motor vehicles,[6] by reducing deaths and injuries due to the crushing of the roof into the occupant compartment in rollover crashes.

This final rule applies to all new large buses, with limited exceptions. The standard does not apply to school buses, prison buses, buses with perimeter seating, or to transit buses that are not OTRBs. School buses already meet an FMVSS for roof strength, which is FMVSS No. 220, ''School bus rollover protection'' (49 CFR 571.220). In response to comments, NHTSA has also decided not to apply the standard to ''school bus derivative buses,'' which this final rule defines as buses built on a school bus platform. These vehicles may not have school bus lights and stop arms meeting FMVSS No. 108 and No. 131, respectively, or seating systems meeting FMVSS No. 222, ''School bus seating and passenger protection,'' but the buses have safety systems that are otherwise identical to school buses regarding their emergency exits, rollover protection (FMVSS No. 220), bus body joint strength, and fuel system integrity. The vehicles could be certified as meeting the FMVSSs for ''school buses'' if they had school bus lights meeting FMVSS No. 108, stop arms meeting FMVSS No. 131, and seating systems meeting FMVSS No. 222. Because school bus derivative buses already meet the roof crush resistance requirements in FMVSS No. 220, it would be redundant to require the buses to meet Standard No. 227 established by this final rule.

The test for the large buses adopted by this final rule is the complete vehicle rollover test of United Nations Economic Commission for Europe (ECE) Regulation 66, ''Uniform Technical Prescriptions Concerning the Approval for Large Passenger Vehicles with Regard to the Strength of their Superstructure,'' (ECE R.66).[7] The test simulates a real-world rollover crash of a large bus. The test bus is placed on a tilting platform that is 800 mm (24 inches) above a smooth and level concrete surface. One side of the tilting platform along the length of the bus is raised at a steady rate of not more than 5 degrees/second until the vehicle becomes unstable, rolls off the platform, and impacts the concrete surface below. Some commenters to the August 6, 2014 notice of proposed rulemaking (NPRM) (79 FR 46090) thought that the test was too lenient, but NHTSA believes that those views are mistaken. As explained in this preamble, this test imparts severe crash forces that the buses must resist. FMVSS No. 227 prohibits any intrusion into the ''survival space'' by any part of the vehicle outside the survival space, except for minute objects weighing less than 15.0 grams, such as pebbles of glazing, or bolts and screws, which do not pose an unreasonable risk to safety for occupants.

The ''survival space'' requirement ensures at least a minimum level of structural integrity for the buses by prohibiting intrusions into the occupant space that can cause harm. It establishes ''improved roof and roof support standards'' that substantially improve the resistance of the roof to deformation and intrusion, in accordance with MAP–21. It ensures that buses are constructed so that structures outside of the survival space, such as luggage racks and large pieces of glazing, do not enter the survival space in the rollover.

The requirement that emergency exits remain shut during and after the rollover test reduces the likelihood of emergency exits becoming ejection portals during rollovers, which is a goal consistent with MAP–21. Section 32703(b)(2) of MAP–21 requires NHTSA to consider requiring advanced glazing[8] standards for each motorcoach portal and ''other portal improvements to prevent partial and complete ejection of motorcoach passengers, including children.'' In NHTSA's motorcoach tests conducted during development of this rulemaking, roof and side emergency exits opened during the rollover event and the panes of advanced glazing popped out of their mounting. The requirement that emergency exits remain closed is a ''portal improvement'' established pursuant to section 32703(b)(2). Additionally, the requirement that the glazing panels not intrude into the survival space by detaching from the non-struck side of the bus will ensure the glazing panels remain intact in their mounting during bus rollover crashes and not form ejection portals.[9]

[4] MAP–21, section 32703(b) and (b)(1)).

[5] ''Motorcoach Census 2013, A Study of the Size and Activity of the Motorcoach Industry in the United States and Canada in 2012,'' American Bus Association Foundation, February 27, 2014.

[6] Passenger vehicles under 4,536 kg (10,000 lb) GVWR are subject to the requirements of FMVSS No. 216, ''Roof crush resistance; Applicable unless a vehicle is certified to § 216a,'' or to FMVSS No. 216a, ''Roof crush resistance, Upgraded standard.''

[7] Dated February 2006, *https://live.unece.org/fileadmin/DAM/trans/main/wp29/wp29regs/r066r1e.pdf.* ECE R.66 defines ''superstructure'' as ''the load-bearing components of the bodywork as defined by the manufacturer, containing those coherent parts and elements which contribute to the strength and energy absorbing capability of the bodywork, and preserve the residual space in the rollover test.'' ''Bodywork'' means ''the complete structure of the vehicle in running order, including all the structural elements which form the passenger compartment, driver's compartment, baggage compartment and spaces for the mechanical units and components.''

[8] MAP–21 (section 32702(1)) defines ''advanced glazing'' as ''glazing installed in a portal on the side or the roof of a motorcoach that is designed to be highly resistant to partial or complete occupant ejection in all types of motor vehicle crashes.'')

[9] On May 6, 2016 (81 FR 27904), NHTSA issued an NPRM proposing to establish FMVSS No. 217a to improve glazing materials used in motorcoaches and other large buses. The NPRM proposed an impactor test of glazing material to simulate the loading from an average size adult male impacting a window on the opposite side of a large bus in a rollover. Countermeasures used to meet the test would likely involve the use of advanced glazing. This final rule adopting FMVSS No. 227 would complement FMVSS No. 217a by improving the securement of the advanced glazing in the buses.

b. How This Final Rule Differs From the Notice of Proposed Rulemaking (NPRM)

The most noteworthy differences between this final rule and the NPRM [10] are highlighted below.

1. This final rule adopts the NPRM's proposed ECE R.66 full vehicle test to improve the roof and structural integrity of OTRBs (except for a few buses with unique configurations), and non-OTRBs with a GVWR greater than 11,793 kg (26,000 lb)). The agency proposed to exclude non-OTRBs with perimeter seating from the standard. After evaluation of the comments received, this final rule excludes all perimeter seating buses, as there is not a sufficient reason to distinguish between buses just based on the location of a luggage compartment. Further, all prison buses are excluded due to the unique interior configuration of the buses, as are school bus derived buses, as the latter vehicles already meet NHTSA's school bus roof crush resistance standard.

2. This final rule adopts the NPRM's proposed prohibition that no part of the bus that is outside the survival space shall intrude into the survival space, both during movement of the tilting platform or resulting from impact of the bus on the impact surface. However, given the high force applications imparted to the bus structure in the rollover test, this final rule permits debris caused by the impact to fall into the survival space, such as small glazing pebbles or bolts and screws. The objects must not weigh more than 15.0 grams.

3. This final rule does not adopt the NPRM's proposal that each anchorage of an interior overhead luggage rack or other compartment must not completely separate from its mounting structure during movement of the tilting platform or resulting from impact of the bus on the impact surface. This final rule also does not adopt the NPRM's proposal that seat anchorages must not become dislodged during the test. Under the NPRM, those proposed prohibitions would have applied even if the luggage rack does not enter the survival space, or the seat anchorages dislodged within the survival space. NHTSA has decided that the primary purpose of this rulemaking is to establish a roof strength and crush resistance standard that improves the resistance of roofs to deformation and intrusion, *i.e.,* by providing a survival space to occupants in rollovers. The purpose is achieved by prohibiting *any* structure, such as overhead luggage racks, from intruding into the survival space. By prohibiting overhead luggage racks from impeding into the survival space in the rollover, overhead luggage racks will have to be better anchored to the bus wall than they had in the past so that they do not detach and intrude into the survival space in the test. Thus, the proposed luggage rack provision is not needed to ensure that a survival space is provided since luggage racks are prohibited from intruding on the survival space. Similarly, the proposed seat anchorage provision is not necessary to achieve a survival space for occupants.

4. This final rule does not adopt the proposed provision that each side window glazing opposite the impacted side of the vehicle must remain attached to its mounting structure so as not to allow the passage of a 102 mm (5-inch) diameter sphere. The sphere test was proposed to ensure that, after the rollover test, the glazing remain firmly attached to its mounting. Because the primary purpose of this rulemaking is to provide a necessary survival space to occupants in rollovers, the purpose is achieved by prohibiting panes of glazing from falling into the survival space. The proposed requirement that the glazing not form openings is not germane to the survival space specification and unnecessarily complicates this rulemaking.

These changes and others are discussed in this preamble.

c. NTSB Recommendations

This final rule accords with the following National Transportation Safety Board (NTSB) recommendations that NTSB issued to NHTSA to improve motorcoach safety.

In an NTSB Highway Special Investigation Report (1999), Bus Crashworthiness Issues,[11] NTSB cited an October 1971 rollover of a 1970 Motor Coach Industries (MCI) bus as justification for the following recommendations:

''H–99–50 (MW): In 2 years, issue performance standards for motorcoach roof strength that provide maximum survival space for all seating positions and that take into account current typical motorcoach window dimensions.''

''H–99–51: Once performance standards have been developed for motorcoach roof strength, require newly manufactured motorcoaches to meet those standards.''

In November 2009, after investigating an August 2008 Sherman, Texas bus crash,[12] the NTSB issued two safety recommendations. In this rollover crash, the failure of the overhead luggage rack on the vehicle impeded passenger egress and rescue efforts. Thus, NTSB stated that the Sherman accident and NHTSA's motorcoach testing indicate that the lack of standards for overhead luggage racks on motorcoaches leaves passengers at risk of serious injury from interaction with overhead luggage racks in a crash and made the following recommendations:

''H–09–23: Develop performance standards for newly manufactured motorcoaches to require that overhead luggage racks remain anchored during an accident sequence.''

''H–09–24: Develop performance standards for newly manufactured motorcoaches that prevent head and neck injuries from overhead luggage racks.''

This final rule is consistent with the above NTSB recommendations. NHTSA is issuing performance standards for motorcoach roof strength that provide a survival space for all seating positions and is requiring new motorcoaches to meet those requirements. The standard established by this final rule requires that overhead luggage racks remain anchored during a rollover such that they do not enter the requisite survival space and injure passengers in the survival space.

d. Costs and Benefits

NHTSA has examined the benefits and costs of this final rule to ensure that the agency adopts only those amendments that contribute to improved safety and that are consistent with the directives of MAP–21 and the principles for regulatory decision-making set forth in Executive Order 12866, *Regulatory Planning and Review*. Over the 15-year period between 2004 and 2018, on average 22 fatalities occurred annually to occupants of these buses. Though a relatively small percentage of overall traffic fatalities, data show that rollover crashes are particularly deadly for large buses. Among the 122 fatal crashes, 56 were rollover crashes resulting in 189 fatalities. This final rule enhances passenger protection in rollover crashes in a reasonable and achievable way. As discussed in the next section, NHTSA adopts this final rule because a rollover structural integrity standard meets the requirements and considerations in

[10] NPRM, August 6, 2014 (79 FR 46090).

[11] National Transportation Safety Board. 1999, *Bus Crashworthiness Issues*. Highway Special Investigation Report NTSB/SIR–99/04. Washington, DC.

[12] NTSB/HAR–09/02 PB2009–916202; Motorcoach Run-Off-the-Bridge and Rollover Sherman, Texas August 8, 2008; October 2009; *https://www.ntsb.gov/investigations/AccidentReports/Reports/HAR0902.pdf*, last accessed 09/08/2021.

subsections (a) and (b) of section 30111 of the Safety Act. This rule provides safety to passengers in a reasonable, objective, and cost-effective manner while harmonizing the standard internationally.

NHTSA has determined this rulemaking to be cost beneficial.[13]

The agency estimates the annual cost of this final rule to be between $4.81 million and $11.84 million (see Table 1 below). The countermeasures may include stronger roof structure, support pillars, side walls, shock resistant latches for emergency exits, and improved window mounting, resulting in material costs for each bus covered under this final rule ranging from $325 to $591. We estimate the total weight increase will range from 181 to 356 kilograms (kg) (399 to 784 pounds (lb)) for each of these buses and cost an additional $1,862 to $4,790 in fuel per vehicle over the lifetime of the vehicle.

We estimated the benefits of this rule taking into account the benefits attributable to the agency's final rules on seat belts and electronic stability control (ESC), as those rules also applied to this universe of vehicles. We estimate that requiring the subject buses to meet the rollover structural integrity performance criteria will save approximately 2–3 lives annually. In addition, we expect that the rule will reduce the number of seriously injured occupants by 4 annually. Thus, we estimate that approximately 3.12 equivalent lives are saved annually if 15 percent of occupants use seat belts, and approximately 2.45 equivalent lives are saved annually (undiscounted) if 90 percent of occupants use seat belts (see Table 2 below).

The cost per equivalent life saved is estimated to be $2.48 million to $4.99 million when belt use is estimated to be 15 percent, and $3.17 million to $6.38 million when belt use is estimated to be 90 percent (see Table 3 below). The net cost/benefit impact ranges from a net benefit of $13.09 million to $23.31 million if seat belt usage is 15 percent. If the seat belt usage rate is 90 percent, the estimated net cost/benefit impact ranges from a net benefit of $8.25 million to a net benefit of $16.97 million (see Table 4 below). While the cost and benefits of this rule will vary depending on the material/fuel costs per vehicle and on the belt use rate, per all available information this final rule will be cost beneficial.

TABLE 1—ESTIMATED ANNUAL COSTS

[2020 Dollars]

Potential Costs:	
Material Costs per Vehicle	$325 to $591.
Material Costs, Total New Fleet	$0.71 million to $1.30 million.
Fuel Costs per Vehicle @ 3%	$2,441 to $4,790.
Fuel Costs per Vehicle @ 7%	$1,862 to $3,654.
Fuel Costs, Total New Fleet	$4.10 million to $10.54 million.
Total Annual Cost	$4.81 million to $11.84 million.

TABLE 2—ESTIMATED ANNUAL BENEFITS

[Undiscounted equivalent lives saved]

15 percent belt usage	3.12
90 percent belt usage	2.45

TABLE 3—COST PER EQUIVALENT LIFE SAVED

[Across 3% and 7% discount, in millions of 2020 dollars]

15 percent belt usage	2.48–4.99
90 percent belt usage	3.17–6.38

TABLE 4—ANNUALIZED COSTS AND BENEFITS

[In millions of 2020 dollars]

15% belt usage:			
3% Discount Rate	6.08–11.84	29.40	17.56–23.31
7% Discount Rate	4.81–9.34	22.43	13.09–17.61
90% belt usage:			
3% Discount Rate	6.08–11.84	23.05	11.21–16.97
7% Discount Rate	4.81–9.34	17.59	8.25–12.78

e. NHTSA's Determination of MAP–21 Requirements and Considerations

Section 32703(b) and (b)(1) of MAP–21 direct NHTSA: (a) To establish improved roof and roof support standards for motorcoaches that substantially improve the resistance of motorcoach roofs to deformation and intrusion to prevent serious occupant injury in rollover crashes involving motorcoaches; if (b) NHTSA determines that such standards meet the requirements and considerations set forth in subsections (a) and (b) of section 30111 of the Safety Act. In addition, section 32703(b)(2) directs NHTSA to consider portal improvements to prevent partial and

[13] NHTSA has developed a Final Regulatory Evaluation (FRE) that discusses issues relating to the potential costs, benefits and other impacts of this regulatory action. The FRE is available in the docket for this final rule and may be obtained by downloading it or by contacting Docket Management at the address or telephone number provided at the beginning of this document.

complete ejection of motorcoach passengers, including children, if such standards meet the requirements and considerations set forth in subsections (a) and (b) of section 30111 of the Safety Act.

NHTSA has determined that the standard issued by this final rule meets the requirements and considerations of section 30111(a) and (b) of the Safety Act.

Section 30111(a)

The provision at 49 U.S.C. 30111(a) of the Safety Act authorizes the Secretary (NHTSA, by delegation) to prescribe Federal motor vehicle safety standards that are practicable, meet the need for motor vehicle safety, and are stated in objective terms. ''Motor vehicle safety'' is defined in the Safety Act as ''the performance of a motor vehicle or motor vehicle equipment in a way that protects the public against unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle, and against unreasonable risk of death or injury in an accident, and includes nonoperational safety of a motor vehicle.'' [14]

NHTSA has determined that the standard issued by this final rule meets the requirements and considerations of section 30111(a) of the Safety Act. The standard is practicable, since it is based on the 2006 ECE R. 66 complete vehicle rollover test. New buses sold in Europe and other countries have been designed to meet the ECE R.66 rollover test requirements for over a decade. Further, NHTSA has conducted the vehicle rollover test of ECE R.66 in developing the NPRM. The three bus rollover tests the agency conducted using the ECE R.66 complete vehicle rollover test procedure showed that the test is feasible and practical for evaluating how well a bus structure maintains occupant survival space in a rollover. The standard is also cost beneficial, and thus is economically practicable.

Standard No. 227 meets the need for safety. Two of the real-world rollover crashes examined for this rule involved buses that had complete roof separation during the rollovers.[15] Almost all the passengers in those two crashes were ejected due to the loss of the bus roofs. This standard will increase the likelihood that bus structures maintain their roof structure and provide a residual survival space for the vehicle occupants. Studies of bus structures before and after implementation of ECE R.66 have concluded those requirements are effective in protecting bus occupants in rollover crashes.[16] A bus design in use prior to ECE R.66 experienced complete structural collapse of the roof in a rollover crash with one and a half full 360 degree rolls down a 6-meter embankment. That bus model redesigned to meet ECE R.66 requirements was able to maintain adequate survival space in a rollover crash with two and a quarter full 360 degree rolls down a 9–10 meter embankment.[17]

This final rule meets the need for safety on many fronts. NHTSA's Motorcoach Safety Action Plan targeted safety improvements for buses to reduce the incidence of fatalities and serious injuries caused by bus rollover accidents. The seat belt requirements in FMVSS No. 208 [18] for large buses provided a means for belted bus occupants to remain within the survival space in a crash. Buses designed to FMVSS No. 227 will provide a survival space for bus occupants. Anti-ejection requirements adopted for bus window portals [19] will reduce the incidence of partial ejection of belted occupants as well as reduce the occurrence of partial or full ejection of unbelted occupants. Further, NHTSA has proposed to establish an FMVSS to require advanced glazing that is highly resistant to occupant ejection for each motorcoach portal, pursuant to section 32703(b)(2) of MAP–21.[20] This final rule adopting FMVSS No. 227 would complement FMVSS No. 217a by improving the securement of the advanced glazing in the buses.

The available information shows this final rule is cost beneficial. NHTSA estimates that requiring the subject buses to meet the performance criteria in this final rule will save approximately 2–3 lives and prevent 4 serious injuries annually. NHTSA estimates the net benefits range from $8.3 million to $23.3 million.

Standard No. 227 is stated in objective terms. The residual survival space is well defined, based upon a specified boundary at each transverse cross-section of the vehicle, with the cross-sections bounded by specified forwardmost and rearmost vehicle landmarks. Potential intrusion into the residual survival space may be objectively measured using standard test measurement methodologies-such as templates representing the outline of the residual survival space and high-speed video. The FMVSS No. 227 test procedure matches the full vehicle test procedure of ECE R.66. Studies have shown the ECE R.66 full vehicle rollover test to be a relatively severe loading condition replicating real-world bus rollover crashes.[21]

Section 30111(b)

The provision at 49 U.S.C. 30111(b) specifies that, when prescribing such standards, the Secretary must consider all relevant, available motor vehicle safety information, consult with the states as appropriate, consider whether a standard is reasonable, practicable, and appropriate for the types of motor vehicles or motor vehicle equipment for which it is prescribed, and consider the extent to which the standard will carry out the statutory purpose of section 30101 of the Act. Section 30101 states that the purpose of the statute is to reduce traffic accidents and deaths and injuries resulting from traffic accidents, and that it is therefore necessary to prescribe FMVSS, and to carry out needed safety research and development.

NHTSA has issued this final rule in accordance with section 30111(b). As discussed throughout this document, the agency concludes, after comprehensive reviews of relevant available safety information that includes over 15 years of crash data and development of a NHTSA plan for motorcoach safety,[22] that adopting FMVSS No. 227 meets the requirements and considerations of the Safety Act. NHTSA has provided the public with opportunities to review and provide input on the agency's safety plan and comment on adoption of this structural integrity final rule when it was in proposed form. This final rule accords with National Transportation Safety Board Recommendations H–99–50, H–99–51, H–09–23, and H–09–24, and NHTSA expects wide public support overall for this final rule. NHTSA has determined that FMVSS No. 227 is reasonable and appropriate for the

[14] 49 U.S.C. 30102(a)(8).

[15] These rollover crashes occurred in Turrell, Arkansas in 2004 and Mexican Hat, Utah in 2008.

[16] Matolcsy, M. (2007), ''The Severity of Bus Rollover Accidents,'' Enhanced Safety of Vehicles (ESV) Paper 07–152, 20th ESV Conference, Lyon, France. *Available at: https://www-esv.nhtsa.dot.gov/Proceedings/20/07-0152-O.pdf*, last accessed April 26, 2021.

[17] Matolcsy, M. (2006), ''Rollover accident with ejection of occupants.'' Informal working document of GRSG, No. GRSG–91–7. GRSG, 91st session, Geneva, October 2006.

[18] 78 FR 70416, November 25, 2013.

[19] 81 FR 27904, May 6, 2016.

[20] May 6, 2016 (81 FR 27904), supra.

[21] Matolcsy, M. (2007), ''The Severity of Bus Rollover Accidents,'' Enhanced Safety of Vehicles (ESV) Paper 07–152, 20th ESV Conference, Lyon, France. *Available at: https://www-esv.nhtsa.dot.gov/Proceedings/20/07-0152-O.pdf*, last accessed April, 26 2021.

[22] NHTSA's Approach to Motorcoach Safety (2007), (Docket No. NHTSA–2007–28793–001), supra.

vehicles to which the standard applies for improving bus occupant protection in rollover crashes and that establishing FMVSS No. 227 meets the purpose and policy of the Safety Act.

f. Retrofitting

NHTSA has decided not to require existing large buses to meet the requirements adopted today for new buses. None of the commenters supported a retrofitting requirement. Based on its tests of older buses, the agency believes that many existing buses may need major structural changes to the vehicle's sidewall and roof structure to meet the requirements adopted in this document. Such structural changes are likely to be cost-prohibitive, making retrofitting impracticable.

II. Introduction

Over the 15-year period between 2004 and 2018, data from NHTSA's Fatality Analysis Reporting System (FARS) indicate there were 122 fatal crashes involving large buses. These crashes resulted in 326 occupant fatalities (274 passenger and 52 driver fatalities). During this period, on average 22 fatalities occurred annually to occupants of these buses.

Data indicate that rollover crashes are a particular safety problem for these buses. Among the 122 fatal crashes, 56 were rollover crashes resulting in 189 fatalities. While fatal rollover crashes constitute about 43 percent of all fatal crashes involving these bus types, they represent about 58 percent of all the occupant fatalities. Further, 56 percent of the rollover crash fatalities were attributable to occupant ejections (106 ejection fatalities out of the total of 189 fatalities in bus rollover crashes).

Congress was especially concerned about motorcoach rollover crashes in passing provisions of MAP–21 relevant to this final rule. MAP–21 requires DOT to ''establish improved roof and roof support standards for motorcoaches that substantially improve the resistance of motorcoach roofs to deformation and intrusion to prevent serious occupant injury in rollover crashes involving motorcoaches'' if such standards meet the requirements and considerations set forth in subsections (a) and (b) of section 30111 of title 49, United States Code.[23] Under MAP–21, ''motorcoach'' means an OTRB, but does not include a bus used in public transportation provided by, or on behalf of, a public transportation agency, or a school bus. MAP–21 [24] also directs DOT to consider ''portal improvements to prevent partial and complete ejection of motorcoach passengers, including children.''

In accordance with MAP–21 and the Safety Act, we have issued this rollover-specific rule to apply to buses associated with an unreasonable risk of fatal rollover involvement. Thus, this final rule applies to OTRBs, and to all non-OTRBs with a GVWR greater than 11,793 kg (26,000 lb) (large buses), with some exceptions. The final rule excludes school buses, prison buses, non-OTRB transit buses, and buses with perimeter seating.[25] We have applied this rule to meet the requirements and considerations of MAP–21 and the Safety Act.

NHTSA is enhancing the safety of large buses in rollovers both by providing a survival space in the occupant compartment, and by reducing the likelihood of emergency exits opening during bus rollovers and becoming ejection portals. NHTSA achieved an important first step enhancing the safety of the buses in rollovers by the November 25, 2013 final rule that requires lap/shoulder belts for all passengers in large capacity buses.[26] This final rule builds on the rollover protection provided by seat belts by ensuring the buses provide a protective survival space for belted and unbelted retained occupants in rollovers. The 2013 seat belt rule significantly increased the ability of occupants of large buses to be retained in the bus structure in rollover crashes. This final rule provides the retained occupants a survival space in the bus structure, and strengthens the bus structure and emergency exit portals to protect unbelted occupants as well.

III. NHTSA's Statutory Authority

NHTSA is issuing this final rule pursuant to and in accordance with its authority under the National Traffic and Motor Vehicle Safety Act and the relevant provisions of MAP–21.

a. National Traffic and Motor Vehicle Safety Act (Safety Act)

Under 49 United States Code (U.S.C.) Chapter 301, Motor Vehicle Safety (49 U.S.C. 30101 *et seq.*), the Secretary of Transportation is responsible for prescribing motor vehicle safety standards that are practicable, meet the need for motor vehicle safety, and are stated in objective terms (section 30111(a)). ''Motor vehicle safety'' is defined in the Safety Act (section 30102(a)(8)) as ''the performance of a motor vehicle or motor vehicle equipment in a way that protects the public against unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle, and against unreasonable risk of death or injury in an accident, and includes nonoperational safety of a motor vehicle.'' ''Motor vehicle safety standard'' means a minimum standard for motor vehicle or motor vehicle equipment performance (section 30102(a)(9)). When prescribing such standards, the Secretary must consider all relevant available motor vehicle safety information (section 30111(b)(1)). The Secretary must also consider whether a proposed standard is reasonable, practicable, and appropriate for the particular type of motor vehicle or motor vehicle equipment for which it is prescribed (section 30111(b)(3)) and the extent to which the standard will further the statutory purpose of reducing traffic accidents and associated deaths and injuries (section 30111(b)(4)). The responsibility for promulgation of FMVSSs is delegated to NHTSA (49 CFR 1.95).

b. MAP–21 (Incorporating the Motorcoach Enhanced Safety Act of 2012)

NHTSA is issuing this final rule in accordance with MAP–21, which incorporates the ''Motorcoach Enhanced Safety Act of 2012'' into Subtitle G.[27] Section 32703(b) of MAP–21 requires the Secretary (NHTSA by delegation) to prescribe regulations that would address certain aspects of motorcoach crash performance within two years if the agency determines that the standards would meet the requirements and considerations of section 30111(a) and (b) of the National Traffic and Motor Vehicle Safety Act.[28]

There are two subsections of section 32703(b) that are particularly relevant to this final rule. Subsection (b)(1) specifies that the Secretary is to establish improved roof and roof support standards that ''substantially improve the resistance of motorcoach roofs to deformation and intrusion to prevent serious occupant injury in rollover crashes involving motorcoaches.'' Subsection (b)(2) directs the Secretary to ''consider advanced glazing standards for each motorcoach portal and [to] consider other portal

[23] MAP–21, section 32703(b)–(b)(1).

[24] *Id.,* section 32703(b)(2).

[25] Under the standard, a bus with perimeter seating is a bus with 7 or fewer designated seating positions rearward of the driver's seating position that are forward-facing or can convert to forward-facing without the use of tools.

[26] NHTSA estimates that seat belts are 77 percent effective in preventing fatalities in rollover crashes.

[27] Moving Ahead for Progress in the 21st Century Act, Public Law 112–141 (Jul. 6, 2012).

[28] *Id.* at section 32703(b).

improvements to prevent partial and complete ejection of motorcoach passengers, including children.'' [29]

MAP–21 contains other provisions pertaining to this rulemaking. Section 32702 states that ''motorcoach'' has the meaning given to the term ''over-the-road bus'' in section 3038(a)(3) of the Transportation Equity Act for the 21st Century (TEA–21).[30] Section 3038(a)(3) of TEA–21 (see 49 U.S.C. 5310 note) defines ''over-the-road bus'' as ''a bus characterized by an elevated passenger deck located over a baggage compartment.'' However, section 32702 of MAP–21 excludes transit buses and school buses from the ''motorcoach'' definition.[31]

MAP–21 further directs the Secretary to apply any regulation prescribed in accordance with section 32703(b) to all motorcoaches manufactured more than 3 years after the date on which the regulation is published.[32] In addition, the Secretary may assess the feasibility, benefits, and costs of applying any requirement established under section 32703(b)(2) to ''motorcoaches manufactured before the date on which the requirement applies to new motorcoaches'' (retrofit).[33] Finally, MAP–21 also authorizes the Secretary to combine the required rulemaking actions as the Secretary deems appropriate.[34]

IV. Safety Need (FARS 2004–2018 Data Analysis)

This rulemaking is conducted pursuant to the requirements of the Safety Act and MAP–21. It investigates whether there are unreasonable safety risks associated with rollover crashes in OTRB transportation, and if there are such risks, whether those safety risks can be reasonably reduced by having at least minimum levels of performance specified for rollover structural integrity and portal improvements.

This rulemaking improves occupant safety in large bus rollover crashes. While developing the November 25, 2013 seat belt final rule, NHTSA found that most fatalities in OTRB crashes are attributable to rollovers. Because more than half of the rollover fatalities are attributable to ejections, NHTSA issued a seat belt requirement to mitigate those ejections.

Enhancing the structural integrity of the interior of these buses works together with the seat belt rule. More occupants will be able to be retained in the bus compartment because of the belts, so it makes sense to require a survival space that protects these restrained occupants in a rollover. Moreover, regardless of whether occupants are belted, data [35] show that the risk of serious injuries and fatalities can be reduced by improving the vehicle structure to protect occupants against collapsing roofs and bus components falling or intruding into the survival space. Additionally, emergency exits should remain closed in a crash, as an open exit forms a portal through which occupants could be completely or partially ejected. This final rule adopts requirements to meet these objectives.[36]

Updated Data Analysis (FARS Data 2004–2018)

After the August 6, 2014 NPRM, NHTSA re-analyzed FARS data files for the years 2004 to 2018 to assess the impacts of this rulemaking.[37] The bus body types coded in FARS are ''school bus,'' ''transit bus,'' ''cross country/intercity bus'' to represent OTRBs (motorcoaches), ''other bus'' to represent other types of buses, and ''unknown bus'' to represent buses that could not be categorized into the other four bus body type categories. Since 2011, a new bus body type, ''van-based buses'' was included. We also examined the FARS body type ''Large Van'' for van-based bus crashes for the years 2004–2018 where the vehicle was used to transport people. The buses can also be categorized by their GVWR: GVWR less than or equal to 10,000 lb, GVWR greater than 10,000 lb and less than or equal to 26,000 lb, and GVWR greater than 26,000 lb. The manner in which a bus was used is coded in FARS as ''school bus,'' ''intercity bus,'' ''transit/city bus,'' ''shuttle bus,'' and ''modified for personal/private use.''

To assess the benefits and costs of this rule, the agency selected buses of body type ''over-the-road bus (OTRB)'' regardless of GVWR [38] and ''other bus,'' ''unknown bus'' and ''van-based bus'' body types with a GVWR greater than 26,000 lb, regardless of the manner in which they were used.[39] NHTSA also included fatal crashes of large vans with a GVWR greater than 26,000 lb used for transporting people (used as intercity bus, charter/tour bus, commuter bus, and shuttle bus) and found none for the 15-year period from 2004 to 2018.

For the 15-year period from 2004 to 2018, there were a total of 326 bus occupant fatalities in the bus types covered by of FMVSS No. 227 (see Table 5). Among these fatalities, 230 were occupants of OTRBs with a GVWR greater than 26,000 lb, 15 were occupants of OTRBs with GVWR <26,000 lb, and 81 were occupants in buses coded as ''other bus,'' ''unknown bus,'' and ''van-based bus'' with a GVWR greater than 26,000 lb. In this 15-year period, fatalities among occupants of OTRBs account for 75 percent of the 326 fatalities.

TABLE 5—BUS CRASH OCCUPANT FATALITIES IN THE BUS TYPES COVERED BY FMVSS NO. 227

[FARS data 2004–2018]

Year	OTRB GVWR <26,000 lb	OTRB GVWR >26,000 lb	Other bus GVWR >26,000 lb	Unknown bus GVWR >26,000 lb	Van-based GVWR >26,000 lb	Total
2004	0	23	4	0		27
2005	0	10	3	4		17

[29] While this final rule is mainly aimed at addressing the rollover structural integrity of specific large bus types, the reduced deformation of the bus structure would ensure that any advanced glazing installed on portals would be retained on their mounting and reduce the risk of occupant ejection in rollover crashes. Further, the requirement that emergency exits should not open during the rollover test would also ensure that the exits do not become ejection portals. Thus, both subsection (b)(1) and subsection (b)(2) are relevant to this rule.

[30] Moving Ahead for Progress in the 21st Century Act, Public Law 112–141, section 32702(6).

[31] *Id.* at section 32702(6)(A)–(B).

[32] *Id.* at section 32703(e)(1).

[33] *Id.* at section 32703(e)(2). ''Retrofit Assessment for Existing Motorcoaches.''

[34] *Id.* at section 32706.

[35] Maétolcsy, M (2012), ''Passenger's Ejection in Bus Rollover Accident,'' FISITA 2012 World Automotive Congress, paper F2012 F02–005. Available at *https://unece.org/DAM/trans/doc/2012/wp29grsg/GRSG-103-02e.pdf.* Last accessed May 03, 2021.

[36] This final rule does not address the issue of glazing breaking in a rollover crash that would result in openings through which occupants could be completely or partially ejected even if emergency exits remain closed. This matter is addressed in the 2016 NPRM for advanced glazing (81 FR 27904), *supra.*

[37] Later in this preamble we discuss our analysis of updated data regarding buses with a GVWR of 10,000–26,000 lb.

[38] All OTRBs (cross country/intercity buses) are covered under MAP–21.

[39] Crashes and fatalities of unknown GVWR buses were proportionally distributed amongst the known values.

TABLE 5—BUS CRASH OCCUPANT FATALITIES IN THE BUS TYPES COVERED BY FMVSS NO. 227—Continued

[FARS data 2004–2018]

Year	OTRB GVWR <26,000 lb	OTRB GVWR >26,000 lb	Other bus GVWR >26,000 lb	Unknown bus GVWR >26,000 lb	Van-based GVWR >26,000 lb	Total
2006	0	8	2	3		13
2007	1	18	8	0		27
2008	0	38	2	0		40
2009	0	9	1	0		10
2010	0	11	1	0		12
2011	0	30	0	0		30
2012	2	12	1	0	1	16
2013	9	8	3	1	0	21
2014	1	18	5	1	0	25
2015	0	12	3	6	0	21
2016	1	8	26	0	0	35
2017	1	5	1	0	0	7
2018	0	13	5	0	0	18
Total	15	230	65	15	1	326

The bus occupant fatalities were further classified by the type of crash (rollover, front, side, rear). FARS also coded fatal bus events ''other'' that could not be classified into one of the four crash types. The bus occupant fatalities in these ''other'' bus crash types were further analyzed and found to result from occupants jumping or falling off the bus, bus fire, explosion inside the bus, heavy object falling on an occupant, and fatal injuries to an occupant that are not crash related. Because these fatalities were not crash related, we did not include them in the count of bus crash fatalities.

In the 15-year period from 2004 to 2018, there were 122 fatal bus crashes of bus types covered by FMVSS No. 227, among which 71 involved OTRBs with a GVWR greater than 26,000 lb (Table 6). Among the 122 crashes, 56 were rollover events, 59 were frontal crashes, 7 were side crashes, and 0 were rear crashes.

TABLE 6—FATAL CRASHES OF BUS TYPES COVERED BY FMVSS NO. 227

[FARS 2004–2018]

Bus body type and GVWR	Rollover	Frontal	Side	Rear	Total
OTRB (GVWR ≤26,000 lb)	7	2	0	0	9
OTRB (GVWR >26,000 lb)	35	33	3	0	71
Other (GVWR >26,000 lb)	11	18	3	0	32
Unknown (GVWR >26,000 lb)	3	5	1	0	9
Van-based (GVWR >26,000 lb)	0	1	0	0	1
Total	56	59	7	0	122

The 122 fatal bus crashes (involving bus types covered under FMVSS No. 227) resulted in 326 bus occupant fatalities (52 drivers and 274 passengers), as shown in Table 7. Among these fatalities, 189 persons (11 drivers, 178 passengers) died in 56 rollover crashes. In contrast, 116 persons (40 drivers, 76 passengers) died in 59 frontal crashes. Bus rollover crashes accounted for 58 percent of the total bus occupant fatalities and 65 percent of the passenger fatalities.

These data show the devastating nature of bus rollover events, where a significant number of fatal or serious injuries can occur in a single bus rollover event. Among the 189 fatalities in bus rollover events, 149 fatalities (79 percent) were in OTRBs with a GVWR greater than 26,000 lb.

TABLE 7—BUS OCCUPANT FATALITIES IN CRASHES OF BUS TYPES COVERED BY FMVSS NO. 227 BY BUS BODY TYPE, GVWR, CRASH TYPE, AND OCCUPANT TYPE

[FARS data 2004–2018]

Bus body type and GVWR	Rollover		Front		Side		Rear		All types		Total Driv ± Pass
	Driv	Pass	Driv	Pass	Driv	Pass	Driv	Pass	Driv	Pass	
OTRB (GVWR ≤26,000 lb)	2	11	1	1	0	0	0	0	3	12	15
OTRB (GVWR >26,000 lb)	7	142	25	46	1	9	0	0	33	197	230
Other (GVWR >26,000 lb)	1	23	12	23	0	6	0	0	13	52	65
Unknown (GVWR >26,000 lb)	1	2	2	5	0	5	0	0	3	12	15
Van-based (GVWR >26,000 lb)	0	0	0	1	0	0	0	0	0	1	1
Total	11	178	40	76	1	20	0	0	52	274	326

NHTSA also examined bus rollover events by the ejection status of occupants, among bus types covered by FMVSS No. 227 (see Table 8). Among the 178 passenger fatalities in bus rollover events, 98 were to occupants ejected or partially ejected from the bus.

TABLE 8—BUS OCCUPANT FATALITIES IN ROLLOVERS IN BUS TYPES COVERED BY FMVSS NO. 227 BY BUS BODY TYPE, GVWR, OCCUPANT TYPE, AND EJECTION STATUS

[FARS 2004–2013]

Bus body type and GVWR	Driver		Passenger	
	Not ejected	Ejected	Not ejected	Ejected
OTRB (GVWR ≤26,000 lb)	0	2	4	7
OTRB (GVWR >26,000 lb)	3	4	60	82
Other bus (GVWR >26,000 lb)	0	1	16	7
Unknown bus (GVWR >26,000 lb)	0	1	0	2
Van-based bus (GVWR >26,000 lb)	0	0	0	0
Total	3	8	80	98

These data show that while transportation by OTRBs (and other similar large buses) is an overall safe form of transportation, given the high occupancy of these vehicles, a significant number of fatal or serious injuries can occur in a single crash. This is especially true in bus rollover crashes that result in occupant ejections.

V. Summary of the NPRM

The NPRM underlying this final rule published August 6, 2014 (79 FR 46090). The agency proposed adoption of a new FMVSS No. 227 to set performance requirements that large buses must meet when tested using the full vehicle ECE R.66 test.

In support of the NPRM, the agency researched two existing roof crush/rollover standards: FMVSS No. 220, ''School bus rollover protection,'' and ECE R.66, ''Uniform Technical Prescriptions Concerning the Approval of Large Passenger Vehicles with Regard to the Strength of their Superstructure.'' [40] The agency purchased three different bus models for this test program. Two older models were selected because they were representative of the range of roof characteristics (such as design, material, pillars, shape, etc.) of large bus roofs in the U.S. fleet. The vehicles selected were two 12.2 meters (m) (40 feet) long model year (MY) 1992 MCI model MC–12, and two 12.2 m (40 feet) long MY 1991 Prevost model (Prevost) LeMirage buses. The agency also procured a MY 2000 MCI bus, Model 102–EL3, that was 13.7 m (45 foot) in length. All five of the buses purchased were tested to requirements in either FMVSS No. 220 or ECE R.66. A summary of the testing program can be found in the NPRM, *supra*, in section IV.b (79 FR 46100–46102).[41]

Applicability

NHTSA proposed FMVSS No. 227 to apply to: (a) All new OTRBs, regardless of GVWR; and (b) all new buses other than OTRBs with a GVWR greater than 11,793 kg (26,000 lb), including prison buses and double-decker buses.[42] NHTSA focused on improving the rollover protection of buses with a GVWR greater than 26,000 lb because these were high-occupancy vehicles with an exceptionally high involvement in fatal rollovers. The agency also focused on the buses to which the agency's November 25, 2013 final rule on passenger seat belts applied.

Performance Requirements

The NPRM proposed performance requirements that the buses must meet when subjected to a dynamic rollover test. The proposed test procedure replicated a rollover crash in a controlled manner. In the proposed test, the bus is placed on a tilting platform that is 800 mm (31.50 inches) above a smooth and level concrete surface. One side of the tilting platform along the length of the vehicle is raised at a steady rate of not more than 5 degrees/second until the vehicle becomes unstable, rolls off the platform, and impacts the concrete surface below with its roof leading edge. The rollover structural integrity test is illustrated below in Figure 1.

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[40] ECE R.66 defines ''superstructure'' as ''the load-bearing components of the bodywork as defined by the manufacturer, containing those coherent parts and elements which contribute to the strength and energy absorbing capability of the bodywork, and preserve the residual space in the rollover test.'' ''Bodywork'' means ''the complete structure of the vehicle in running order, including all the structural elements which form the passenger compartment, driver's compartment, baggage compartment and spaces for the mechanical units and components.'' (Footnote added.)

[41] For further information on the four older buses tested, a detailed discussion of the tests and results are available in the docket entry NHTSA–2007–28793–0019. For further information on the newer vehicle tested, see the test report, ''ECE Regulation 66 Based Research Test of Motorcoach Roof Strength, 2000 MCI 102–EL3 Series Motorcoach, NHTSA No.: MY0800,'' October 1, 2009, Report No.: ECE 66–MGA–2009–001, which can be found on NHTSA's website. *https://www-nrd.nhtsa.dot.gov/database/aspx/searchmedia2.aspx?database=v_=6797&mediatype=r&r_tstno=6797*, Report 8. Step-by-step instructions on accessing the research report can be found in a memorandum in Docket No. NHTSA–2007–28793–0025.

[42] Excepted from the NPRM were all school buses, and non-OTRB transit buses and non-OTRBs with perimeter seating.

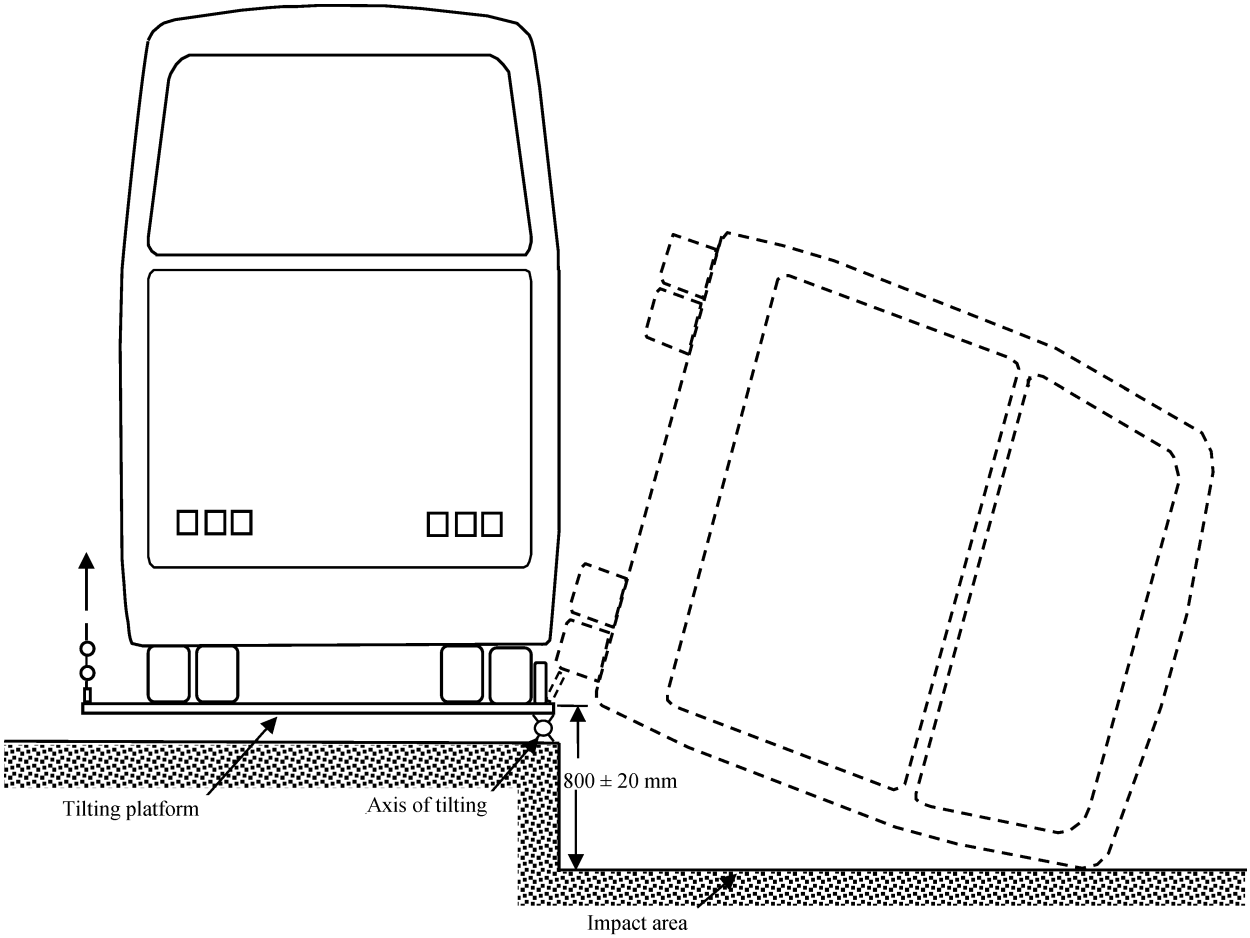

Figure 1: Vehicle on Tilting Platform

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NHTSA proposed that the agency could position the bus such that either side (right or left) of the vehicle may be tested for compliance, at the agency's option. The NPRM proposed that a mass of up to 68 kg (150 lb) (ballast) be secured in each designated seating position (DSP) equipped with a seat belt.

The main proposed performance requirements were as follows:

(1) Intrusion into the survival space by any part of the vehicle outside the survival space would be prohibited;

(2) Each anchorage of all seats and interior overhead luggage racks and compartments would be prohibited from completely separating from its mounting structure during movement of the tilting platform or from impact of the bus on the impact surface; [43]

(3) Emergency exits would be required to remain shut during the test, and, after the test, be operable in the manner required under FMVSS No. 217, ''Bus emergency exits and window retention and release''; and,

(4) Each side window glazing on the non-impacted side and roof of the vehicle would be required to remain attached to its mounting such that there is no opening that allows the passage of a 102 mm (4 inch) diameter sphere when a force of no more than 22 Newtons (N) is applied to the sphere at any vector in a direction from the interior to the exterior of the vehicle.

The proposed requirements described in paragraphs (2), (3) and (4) are beyond those specified in ECE R.66. The ECE regulation mainly assesses the strength of the ''superstructure'' [44] in preventing intrusion into the survival space (ECE R.66 uses the term ''residual space'' rather than survival space). The regulation specifies that the superstructure of the vehicle shall have sufficient strength such that no part of the vehicle that is outside the residual space at the start of the test (*e.g.*, pillars, luggage racks) shall intrude into the residual space during the test.

VI. High Level Summary of the Comments

NHTSA received 19 comments on the NPRM from commenters that included large bus manufacturers producing large buses domestically and abroad (Van Hool, TEMSA, Prevost, MCI, Daimler EvoBus, Daimler Trucks/Thomas Built Buses, IC Bus), small (final-stage) manufacturers (Hemphill Brothers (Hemphill), NiteTrain Coach (NiteTrain)), a bus industry group (American Bus Association (ABA)), a

[43] One reason for the proposal for overhead luggage racks was to further enhance structural integrity. NHTSA thought that, to meet the luggage rack retention requirement, a bus would have to limit its deformation and ''racking'' in the test. ''Racking'' means the tilting of the sides of the bus relative to the bus floor. The retention requirement would have applied to luggage racks regardless of their position relative to the survival space. If the rack separated from its mounting it would be a failure, even if the overhead luggage rack did not enter the survival space.

[44] ECE R.66 Revision 1 defines ''superstructure'' as ''the load-bearing components of the bodywork as defined by the manufacturer, containing those coherent parts and elements which contribute to the strength and energy absorbing capability of the bodywork, and preserve the residual space in the rollover test.''

glazing industry group (Enhanced Protective Glass Automotive Association (EPGAA)), motorcoach operators (Greyhound, Hemphill, NiteTrain [45]), the National Transportation Safety Board (NTSB), a research laboratory (Florida A&M University's and Florida State University's Crashworthiness and Impact Analysis Laboratory (CIAL)), a consumer advocacy group (Advocates for Highway Safety (Advocates)), a group of families of passengers involved in six bus crashes, and two private citizens.

There was almost unanimous support for an FMVSS on large bus structural integrity, but differing views on what that standard should require. European bus manufacturers Van Hool and TEMSA opposed the proposed requirements and test procedures that differed from ECE R.66, believing that the ECE R.66 test was appropriate for assessing the strength of the bus superstructure and that subsystems such as seats, overhead racks, emergency exits, and glazing should not be assessed under the proposed standard. ABA concurred with this view. Daimler Trucks/Thomas Built Buses and IC Bus generally supported the intent and requirements of the NPRM but supported incorporating the test procedure of FMVSS No. 220, ''School bus rollover protection'' (49 CFR 571.220), rather than the test of ECE R.66, for school bus derived buses.

Hemphill and NiteTrain expressed concern about the test burdens on small manufacturers and suggested, as did ABA and Prevost, excluding entertainer buses from the standard. MCI and Van Hool suggested excluding prison transport buses and double-decker buses, respectively.

Consumers and consumer groups believed the proposal was not stringent enough or sufficiently representative of a high speed motorcoach rollover crash involving a bus sliding down an embankment. There were concerns expressed about the sphere test not representing the force imposed by an unbelted passenger thrown against the bus window. EPGAA believed that the proposed requirements should have accounted more for the potential use of advanced glazing as an ejection-mitigation countermeasure.

NTSB and CIAL believed the proposed standard should apply to all non-OTRBs with a GVWR greater than 4,536 kg (10,000 lb), rather than just to non-OTRBs with a GVWR greater than 11,793 kg (26,000 lb). NTSB also suggested the proposed performance requirements should apply to ''moon roofs'' and to side emergency doors.

No commenter supported a retrofit requirement.

VII. Scope and Purpose of the Rule

NHTSA proposed in the NPRM that the scope of FMVSS No. 227 would be to establish performance requirements for bus rollover structural integrity, and that the purpose of the standard would be to reduce death and injuries resulting from the structural collapse of the bus body structure, the unintended opening of emergency exits, and the detachment of window glazing, seats, and overhead luggage racks.

Van Hool, TEMSA, and the ABA opposed the scope of the proposed requirements and test procedures. The commenters believed that the ECE R.66 test was appropriate for assessing the strength of the bus ''superstructure'' but that subsystems such as seats, overhead racks, emergency exits, and glazing should not be assessed under FMVSS No. 227. Those commenters, and Prevost, believed that the ECE R.66 rollover test is only designed for, and is capable only of, providing an evaluation of the bus superstructure strength.

ECE R.66 defines ''superstructure'' as ''the load-bearing components of the bodywork as defined by the manufacturer, containing those coherent parts and elements which contribute to the strength and energy absorbing capability of the bodywork, and preserve the residual space in the rollover test.'' ECE R.66 requires that the superstructure of the bus must have sufficient strength to ensure that, during and after the rollover test, no part of the vehicle that is outside the survival space at the start of the test intrudes into the survival space during the test.

Agency Response

This final rule adopts the NPRM's proposed prohibition that no part of the bus that is outside the survival space shall intrude into the survival space, both during movement of the tilting platform or resulting from impact of the bus on the impact surface.[46] However, after consideration of the comments, NHTSA has decided not to adopt the NPRM's proposal that each anchorage of an interior overhead luggage rack or other compartment must not completely separate from its mounting structure during movement of the tilting platform or resulting from impact of the bus on the impact surface or that seat anchorages not become dislodged during the test.

Under the NPRM, those proposed prohibitions would have applied even if the luggage rack does not enter the survival space, or the seat anchorages dislodge within the survival space. NHTSA has decided that the primary purpose of this rulemaking is to establish a roof strength and crush resistance standard that improves the resistance of the bus superstructure to deformation and intrusion, *i.e.* , by providing a survival space to occupants in rollovers. The purpose is achieved by prohibiting any structure, such as overhead luggage racks, from intruding into the survival space. By prohibiting overhead luggage racks from impeding into the survival space in the rollover, overhead luggage racks will have to be better anchored to the bus wall than they had been in the past, so that they do not detach and intrude into the survival space in the test. Thus, the proposed luggage rack provision is not needed to provide a survival space, since luggage racks are prohibited from intruding into the survival space. By being securely anchored so that they do not fall into the survival space, luggage racks will be less likely to impede egress in an emergency, or fall and cause head and neck injuries to occupants.

NHTSA has decided against adopting the NPRM's proposal that seat anchorages must not become dislodged during the test. The agency believes the seat anchorage provision is not necessary to achieve a survival space for occupants. NHTSA proposed the requirement for the retention of seat anchorages because of the agency's test of the MY 1991 Prevost LeMirage bus.[47] In the test, anchorages of a seat with a restrained mid-size adult male dummy completely separated from its bus attachment location, allowing the seat to fall across the bus with the restrained dummy attached to the seat. NHTSA believed at the NPRM stage that the

[45] Both Hemphill and NiteTrain describe themselves not only as manufacturers of ''entertainer buses'' but also providers of motorcoach transportation services to the entertainment industry, operating the vehicles under contractual arrangements. Hemphill states that the majority of the contractual arrangements for operating the motorcoaches exceed 30 days, with many contracts covering periods of more than one year. Both Hemphill and NiteTrain describe ''entertainer buses'' as customized vehicles that include kitchens, bathrooms, bedrooms and lounging areas. Passengers are members of entertainment groups, including the lead artists, band members, road managers, stage hands and others, traveling on the road to different performance venues.

[46] In response to comments, however, the final rule permits detritus and other debris caused by the impact to fall into the survival space, such as small glazing pebbles or bolts and screws. The objects must not weigh more than 15.0 grams. This issue is discussed in detail below.

[47] A summary of the test may be found in the NPRM, *supra*, in section IV.b 79 FR 46100–46102.

failure of the seat anchorages during the rollover test presented a significant safety risk to restrained occupants in bus rollover events and reduced the effectiveness of seat belts.

However, after considering the comments and other information, NHTSA concludes a specific requirement in FMVSS No. 227 for seat anchorages to remain completely attached is unnecessary for several reasons. First, the seat anchorages in the MY 1991 Prevost LeMirage separated from the bus because the seat was bolted to unreinforced sheet metal of the bus sidewall. In NHTSA's test of the newer MY 2000 MCI bus Model 102–EL3, none of the seats anchorages failed—despite the fact that certain seats were ballasted with either a 150 lb anthropomorphic ballast or with 150 lb steel weights. That is, the seats remained attached even while tested under highly demanding conditions, with the ballasts attached to the seats. This test of the MY 2000 MCI bus demonstrates that bus seat anchorage designs have improved since the MY 1991 and 1992 buses NHTSA tested in its test program.

Second, it is likely the connectivity strength of seat anchorage designs have improved even more since the design of the MY 2000 bus because of the agency's 2013 final rule requiring lap/shoulder belts on all large buses. The final rule requires the lap/shoulder belts to be integral to the bus seats, and that the belt anchorage, together with the seat anchorage to the bus, meet the rigorous strength requirements of FMVSS No. 210, ''Seat belt assembly anchorages'' (49 CFR 571.210). FMVSS No. 210 requires seat anchorages, attachment hardware, and attachment bolts to withstand loads of 13,345 N (3,000 lb) applied simultaneously to the lap belt portion and the shoulder belt portion of the Type 2 restraint system. The seat anchorages of new large buses meeting FMVSS No. 210 will be reinforced over and beyond the design of a MY 2000 bus, which reduces the risk even further that the seats will detach from the bus structure in a rollover as had been observed in the tests of the MY 1991 and 1992 buses. Thus, adding a specific requirement in FMVSS No. 227 for the seat anchorages to remain completely attached duplicates the seat anchorage retention requirements of FMVSS No. 210.

The agency's bus rollover tests found that glazing panels vacated their window mountings during the rollover. In adopting the proposal that items outside of the survival space must not enter the survival space, this final rule prohibits large panes of glazing falling into the survival space from the non-struck side of the bus and injuring occupants. Strengthening the structure of the bus and glazing mountings to resist the rollover crash forces that act to pop out window glazing is an important ''portal improvement'' to prevent partial and complete ejection of motorcoach passengers,'' as directed by MAP–21 section 32703(b)(2). Further, strengthening the frames is critical to rollover safety if the subject buses employ advanced glazing that mitigate the risk of occupant ejection in rollovers. NHTSA research into advanced glazing as a means of mitigating occupant ejection [48] revealed the need for significant improvement in the structural integrity of motorcoaches before the benefits of advanced glazing materials could be achieved. FMVSS No. 227's survival space requirement will help prevent glazing from popping out or otherwise detaching from its window mount and will help ensure the safety countermeasures are retained in the window frames in a crash.

This final rule adopts the requirement for emergency exits to remain closed. This requirement is beyond ECE R.66 but is needed to address concerns relevant to the U.S. NHTSA's bus rollover tests found that emergency exit windows and roof hatches opened during the rollover. NHTSA considers open emergency exits potential safety hazards, as open emergency exits create unsafe ejection portals during a rollover crash. Approximately two-thirds of the fatalities in bus rollover crashes in this country involve occupants ejected from the bus. Reducing the likelihood of ejections through these portals by upgrading latches and hinges will reduce the fatality risk in rollovers and conform to the mandate of MAP–21 section 32703(b)(2).

ABA states that NHTSA placed too much emphasis on preventing unbelted passenger ejection rather than on ensuring the integrity of the body structure. It also states that the FMVSS No. 227 requirements that are not in ECE R.66 replicate the benefits already achieved through the bus seat belt rule.

NHTSA does not agree that FMVSS No. 227 overemphasizes unbelted passengers. Passengers using seat belts, and those that do not, will benefit from the standard by being protected from collapsing bus structures or contact with loose heavy objects. The requirements of FMVSS No. 227 supplement, and do not replicate, the agency's final rule on passenger seat belts. With belted passengers more likely to be retained in the bus interior because of the belts, FMVSS No. 227 improves the protective attributes of the occupant compartment in which they are retained. FMVSS No. 227 will benefit unbelted occupants by helping retain glazing in window frames and providing at least a minimum level of protection against dangerous structural collapse into the occupant compartment. The requirement that emergency exits remain closed during the rollover test increases the likelihood that emergency exits do not become ejection portals during rollover crashes, including crashes involving more than a quarter turn. These requirements will benefit belted and unbelted occupants, as keeping side window exits closed protects against partial ejection of belted occupants and partial and complete ejections of unbelted occupants, including children.

VIII. Applicability of the Rule

NHTSA proposed to apply FMVSS No. 227 to high-occupancy vehicles with an unreasonably high involvement in fatal rollovers, and on which Congress focused in MAP–21.[49] NHTSA proposed to apply FMVSS No. 227 to buses to which the agency's November 25, 2013 final rule on passenger seat belts applied.[50] NHTSA's view in the NPRM was that FMVSS No. 227 should apply to those buses with seat belts, so that a survival space could be provided to the belted occupants.[51]

The agency received a number of comments relating to the proposed applicability of FMVSS No. 227. Two commenters requested us to include medium-size buses (buses with a GVWR between 4,536–11,793 kg (10,000–26,000 lb), two suggested excluding

[48] Martec Limited, ''Motorcoach Glazing Retention Test Development For Occupant Impact During a Rollover,'' August 2006; Docket No. NHTSA–2002–11876–0015. Among other things, this research found that advanced glazing, such as laminate glazing, could pop out of its mounting due to torsional deformation of the structure around the window.

[49] MAP–21 Subtitle G, the ''Motorcoach Enhanced Safety Act of 2012,'' defined ''motorcoach'' as having the meaning given the term ''over-the-road bus'' in section 3038(a)(3) of TEA–21 (49 U.S.C. 5310 note) but did not include a transit bus or a school bus. Under MAP–21, an over-the-road bus is a bus characterized by an elevated passenger deck located over a baggage compartment.

[50] NHTSA's seat belt rule applied to all new over-the-road buses regardless of GVWR, including transit buses, prison buses, and perimeter-seating buses). The rule also applied to non-OTRBs that have a GVWR greater than 11,793 kg (26,000 lb), except for non-OTRB transit buses, prison buses, and perimeter-seating buses. The seat belt rule did not apply to school buses.

[51] The proposed rollover structural integrity requirements applied to all new over-the-road buses regardless of GVWR (except for school buses). The rule also applied to all new non-OTRBs with a GVWR greater than 11,793 kg (26,000 lb), except for school buses, transit buses, and perimeter-seating buses.

entertainer buses, one suggested excluding prison transport buses and another suggested excluding double-decker buses.

a. Medium-Size Buses (Buses With a GVWR of 4,536 to 11,793 kg (10,000–26,000 lb))

In the NPRM, NHTSA proposed not applying FMVSS No. 227 to medium-size buses. NHTSA based the decision on an analysis of crash data for medium-size buses. The agency examined 2000–2009 FARS data showing 42 occupant fatalities in buses with a GVWR between 4,536–11,793 kg (10,000–26,000 lb), of which 24 fatalities were a result of 13 rollover crashes. Over the ten-year period between 2000–2009, medium-size buses were associated with an average of 1.3 rollover crashes per year and 2.4 fatalities per year. In contrast, there was an average of 3.2 rollover crashes annually among large buses (OTRBs and non-OTRBs with a GVWR greater than 11,793 kg (26,000 lb)). These large bus rollover crashes resulted in an average of 11.4 fatalities per year. Among all fatalities occurring in rollover crashes in buses coded in FARS as ''cross-country,'' ''other,'' and ''unknown'' with a GVWR greater than 4,536 kg (10,000 lb), 83 percent were in buses with a GVWR greater than 11,793 kg (26,000 lb).

Two commenters (NTSB, CIAL) disagreed with the agency and commented that NHTSA should include medium-sized buses in the applicability of FMVSS No. 227.[52]

NTSB Comment

NTSB commented that medium-size buses are often used in a similar fashion as motorcoaches with GVWRs over 11,793 kg (26,000 lb). It disagreed with the data analysis in the NPRM showing that medium-size buses do not have the same crash involvement as OTRBs and non-OTRBs with a GVWR over 11,793 kg (26,000 lb). NTSB stated that FARS has coding issues that may result in undercounting fatalities for the medium-size bus type. It references several crashes that it believes were not counted in the FARS database and suggest that the University of Michigan's Buses Involved in Fatal Accidents (BIFA) database has a more accurate classification of crashes.

Agency Response

NTSB correctly pointed out that we had not included the data that NTSB discussed in its comment. We have updated our FARS data analysis on medium-size buses to include these data. Even with the adjustment, however, our analyses find that medium-size buses do not pose a sufficient safety need to warrant application of FMVSS No. 227 to the buses.

After NTSB commented, NHTSA carefully reexamined and updated FARS data to determine whether the agency under-counted the medium-size bus fatalities. We specifically used FARS data from 2004 to 2018 to ascertain the fatalities attributable to medium-size buses.

FARS has five relevant categories for medium-size buses that are non-OTRBs: ''other bus,'' ''unknown bus,'' ''van-based bus,'' ''school bus,'' and ''transit bus.'' Due to the intended scope of this rulemaking, NHTSA focused on only the first three categories.

To assure the dataset was complete, NHTSA also reexamined the FARS body types to check to make sure all medium-size buses were included in the analysis. There had been a change in FARS body codes in 2010. Prior to 2010, van-based buses with GVWRs less than or equal to 10,000 lb were coded as body type code 21, ''large van.'' In 2010, body code 55 was added to the FARS coding manual (van-based bus with a GVWR greater than 4,536 kg (10,000 lb)). With that change, NHTSA considered whether, for the FARS data files before 2010, it was possible that some van-based buses with a GVWR greater than 4,536 kg (10,000 lb) were classified under body code 21. Consequently, NHTSA searched for crashes involving body code 21 with a GVWR greater than 10,000 lb and with a bus use codes of ''intercity,'' ''charter/tour,'' ''transit/commuter,'' ''shuttle''[53] to see if there were any other rollover crashes involving types of vehicles that could be considered ''medium-size buses.'' We identified three rollover crashes, as shown in Table 9 below.

Table 9 below shows the number of medium-size bus crashes with a fatality, over a fifteen-year period.

TABLE 9—FATAL BUS OCCUPANT CRASHES OF MEDIUM-SIZE BUSES (GVWR 10,000 LB TO 26,000 LB) THAT ARE NON-OTRBS, BY THE BODY TYPE AND THE CRASH MODE

[FARS 2004–2018]

Body type	Rollover	Frontal	Side	Rear	Total
Other bus	7	8	3	1	19
Unknown bus	3	2	0	0	5
Van-based bus	9	20	8	2	39
Large van (used as intercity, tour, commuter, or shuttle buses)	3	6	5	2	16
Total	22	36	16	5	79

The data show that there were 79 fatal medium-size bus crashes between 2004 and 2018, of which 22 of the 79 crashes were rollover crashes. For the purposes of determining the safety need of applying FMVSS No. 227 to medium-size buses, NHTSA will focus only on rollover crashes, as the harm the standard is intended to address, and the countermeasures that will be installed pursuant to that harm, only result from rollovers.

Table 10, below, shows the total number of medium-size bus fatalities attributable to various crash types.

[52] While CIAL focused on paratransit medium-size buses, it requests applying FMVSS No. 227 to all medium-size buses. Further, as its comment does show that paratransit buses have a different safety concern compared other medium-size buses, we are responding to the comment about the whole weight class rather than specifically regarding paratransit buses only.

[53] FARS has bus use categories of not a bus, school, intercity, charter/tour, transit/commuter, shuttle, modified for personal/private use, not reported, and unknown. Among these bus use categories, the large vans that were used as charter/tour, intercity, commuter, and shuttle were relevant to this rulemaking. Therefore, only the large vans with these bus use codes were included.

TABLE 10—FATALITIES IN MEDIUM-SIZE BUSES BY BODY TYPE, CRASH MODE, AND OCCUPANT TYPE
[FARS 2004–2018]

Body type	Rollover		Front		Side		Rear		All types		Total
	Driv	Pass	Driv	Pass	Driv	Pass	Driv	Pass	Driv	Pass	
Other bus	1	18	5	7	1	2	0	1	7	28	35
Unknown bus	0	6	1	1	0	0	0	0	1	7	8
Van-based bus	4	7	12	28	1	8	1	1	18	44	66
Large van (used as intercity, tour, commuter, or shuttle buses)	1	8	3	7	0	7	1	2	5	24	29
Total (above)	6	39	21	43	2	17	2	4	31	103	134

For the three relevant medium-size bus types and the large vans used as buses, there were 45 total fatalities (6 driver fatalities and 39 passenger fatalities) in rollover crashes for the fifteen-year period. Over the 15-year period 2004–2018, there were an average of 1.5 fatal medium-size bus rollover crashes, with an average of 3.0 bus occupant fatalities per year.These values are small compared to those of large buses. According to data from FARS 2004–2018, there was an average of 3.7 fatal rollover crashes involving large buses (GVWR greater than 11,793 kg (26,000 lb)) (including OTRBs), resulting in an average of 11.7 occupant fatalities per year. There are significantly higher average rates of annual fatal crashes and fatalities for large buses compared to medium-size buses.

While the average rates of annual fatal crashes and fatalities for large buses are significantly higher than those of medium-size buses, the fleet size of large buses is significantly smaller than that of medium-size buses. There are an estimated 2,200 large buses (GVWR greater than 11,793 kg (26,000 lb)) (including OTRBs) produced annually, compared to approximately 15,000 buses with a GVWR between 4,536–11,793 kg (10,000–26,000 lb) produced annually.[54] Table 11, below, summarizes these figures.

These data mean that there is a considerable disparity between the fatal rollover crash involvement for large buses versus medium-size buses. Not only are large buses involved in more than twice as many rollover crashes on average annually, they also have about four times the number of occupant fatalities annually in rollover crashes than medium-size buses. Further, taking into consideration the almost seven-fold difference in annual production between large buses and medium-size buses (the annual production of large buses is about 1/7th of the annual production of medium-size buses), the safety need for FMVSS No. 227 is substantially higher for large buses than for medium-size buses.

TABLE 11—SUMMARY STATISTICS FOR FATAL ROLLOVER CRASHES AND OCCUPANT FATALITIES FOR LARGE BUSES (INCLUDING ALL OTRBS) AND MEDIUM-SIZE BUSES
[From 2004 to 2018 (FARS)]

Bus size	Avg. annual rollover crashes	Avg. annual rollover fatalities	Avg. annual fleet sales
Large Bus (greater than 26,000 lb GVWR) and all OTRBs	3.7	11.7	2,200
Medium-Size Bus (GVWR of 10,000–26,000 lb)	1.5	3.0	15,000

With regard to the question whether there is a safety need to apply FMVSS No. 227 to medium-size buses, NHTSA's answer is no, the data do not show such a need at this time. The difference between the fatal rollover crash involvement between large and medium-size buses may be attributable to medium-size bus designs (*e.g.* , medium-size buses may have a lower center of gravity compared to heavy buses, affecting crash involvement and/or severity, or have better vehicle controllability for a variety of reasons), or may reflect a difference in how the buses are used. Regardless, the data dissuade NHTSA from applying FMVSS No. 227 in a one-size-fits-all manner to all buses. NHTSA concludes there is not a substantial safety need to apply the standard to medium-size buses.

NHTSA does not concur with NTSB's view that the BIFA database provides more relevant statistics than NHTSA's database. The BIFA database only includes data up to 2010, and so more recent crash data are not available. Since 2010, NHTSA has improved the accuracy of its crash data collection on buses and has expanded the bus category to include van-based buses. NHTSA's updated analysis using the FARS data files more accurately includes the mid-size bus crash information.

NTSB stated that the statistics from BIFA indicate that 128 medium-size buses were involved in fatal crashes, resulting in 58 occupant fatalities between 2000–2009. This information does not show whether these crashes were rollover crashes (the crashes relevant to this rulemaking), or whether the 58 occupants were killed in rollovers. Despite the lack of specific data about the nature and severity of the crashes, NHTSA undertook an analysis assuming that all the crashes NTSB referenced were rollover crashes, and that all 58 fatalities were attributable to rollovers. NHTSA found that, even with this assumption, the data still show a large disparity between the rollover crashes associated with large buses versus medium-size buses. Even if all 58 fatalities were attributable to rollover crashes, such crashes would contribute

[54] Evaluation of the Market for Small-to-Medium-Sized Cutaway Buses, Federal Transit Administration Project#: M1–26–7208.07.1, December 2007, available at *https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/AnEvaluationofMarketforSmalltoMediumSizedCutawayBuses.pdf*, last accessed November 04, 2016.

to, on average, 5.8 deaths annually (58 fatalities/10 years). In this hypothetical scenario, large buses would still be associated with 1.3 times the number of fatalities compared to medium-size buses each year—while the annual production of large buses would continue to be around 1/7th of the annual production of medium-size buses. Thus, even when factoring in the crash data suggested by NTSB and making assumptions about the data that likely includes more crashes and fatalities than actually occurred in medium-size buses, the data again show an absence of a safety need for applying FMVSS No. 227 to medium-size buses.

For the reasons above and in the NPRM, NHTSA declines to extend FMVSS No. 227 to medium-size buses.

CIAL Comment

CIAL argued that the proposed standard should apply to medium-size paratransit buses because buses meeting the proposed standard would be safer for passengers. It indicated it has been researching medium-size paratransit buses designed to meet FMVSS No. 220 [55] and found that buses meeting FMVSS No. 220 fail a dynamic rollover test based ''on the concept of survival space.'' The commenter stated that six buses it tested showed a failure mode ''in which a weak frontal structure allowed for excessive deformation to occur in the front portion of the bus body.''

Agency Response

NHTSA declines to make the suggested change. CIAL's comment did not provide a basis to conclude there is a safety need to adopt the FMVSS No. 227 test for medium-size buses. (See response, above, to NTSB on this issue.) CIAL states that its evaluation using finite element models of medium-size paratransit buses shows that paratransit buses meeting FMVSS No. 220 failed to meet a ''survival space'' criterion of a Florida state vehicle standard. While CIAL's comparison of the performance of paratransit buses under the requirements in FMVSS No. 220 and ECE R.66 was based on simulations, NHTSA conducted the physical tests specified in the two standards on the same large bus models. NHTSA's rollover testing of motorcoaches indicated that large buses that did not meet the ECE R.66 survival space requirement also failed the FMVSS No. 220 requirements.

Additionally, as noted earlier, over the 15-year period 2004–2018, there were an average of 1.5 fatal medium-size bus rollover crashes, with an average of 3 bus occupant fatalities per year. These data apply to all medium-size buses and therefore, the average annual number of rollover crashes and fatalities associated with medium-size paratransit buses would be extremely small. The fact that the vehicles did not meet the survival space criterion is not commensurate with a need to apply FMVSS No. 227 to the vehicle type at the FMVSS level. We decline to make the requested change, for the reasons provided above and in the NPRM.

b. Large Buses

Entertainer Buses

NHTSA proposed to apply FMVSS No. 227 to all OTRBs as they were defined in MAP–21. In doing so, NHTSA intended to cover all the buses Congress directed the agency to address in MAP–21, regardless of GVWR.

Comments Received

Hemphill and NiteTrain, manufacturers and operators of over-the-road entertainer buses, expressed concern about the test burdens on small final-stage manufacturers of these vehicles, and suggested excluding entertainer buses from the standard. Prevost, a manufacturer of both complete motorcoaches and incomplete vehicles (''shells''), also commented in favor of excluding entertainer buses. According to Hemphill and NiteTrain, their entertainer buses are built from incomplete bus shells purchased from Prevost. The shells consist of the window exits, roof exits, sidewall, and roof structure.

NiteTrain and Hemphill stated that since they do not alter the safety structure of their purchased motorcoach shells, any compliance with the new standard should be the responsibility of the shell manufacturer. ABA commented that NHTSA should consider entertainer buses a distinct type of motor vehicle and decide ''on a case-by-case basis, the extent to which each element of the motorcoach safety requirements should be made applicable.''

Agency Response

NHTSA has decided not to apply FMVSS No. 227 to over-the-road perimeter-seating buses. The agency's decision to scale back the scope of FMVSS No. 227 is based on an analysis of safety need, and not on a finding that small manufacturers cannot certify compliance with the standard. There are ways small manufacturers may certify to FMVSS No. 227 that would not impose undue burdens on the manufacturers. For a discussion of those options, see the August 6, 2014 NPRM preceding this final rule (79 FR 46116–46117), and the Regulatory Flexibility Act analysis below in this final rule.

Instead, NHTSA has reassessed the need to apply FMVSS No. 227 to OTRBs with perimeter seating after considering that non-OTRBs with perimeter seating are excluded from the standard. NHTSA does not find a reason to distinguish between OTRB with perimeter seating and non-OTRB with perimeter seating, when the safety data indicate no relevant differences between the vehicles based on safety need. OTRB with perimeter seating do not present a greater risk of injury due to the failure of the structural integrity of the buses compared to non-OTRBs with perimeter seating.

Section 32703(a) of MAP–21 mandated NHTSA to prescribe a seat belt rule for lap/shoulder belts for motorcoaches (*i.e.* , which MAP–21 basically defined as over-the-road buses, except transit buses and school buses) and did not provide NHTSA discretion in applying the requirement. Thus, the 2013 seat belt rule issued pursuant to section 32703(a) applied uniformly to all over-the-road buses. NHTSA also applied the rule to non-OTRBs, but had discretion to draw distinctions among buses in that bus category, as appropriate. NHTSA drew on that discretion to design a rule that excluded non-OTRBs with perimeter seating from the belt requirement, based on an absence of a safety need for the belts.

NHTSA drafted the FMVSS No. 227 NPRM preceding this final rule to apply the proposed structural integrity requirements to the buses that were subject to the lap/shoulder belt requirements adopted by the 2013 MAP–21 final rule. The agency believed that there was a need to ensure enhanced structural integrity of the interior of buses subject to the seat belt rule, to better protect the restrained occupants who, due to the belts, will be retained in the bus interior.[56] The NPRM excluded from proposed FMVSS No. 227 perimeter seating buses, but not if they were OTRBs.[57]

[55] The requirements in FMVSS No. 220 apply to school buses. The test in FMVSS No. 220 places a uniformly distributed vertical force pushing directly downward on the top of the bus with a platen.

[56] 79 FR 46096, col. 1.

[57] The proposed definition of ''perimeter-seating bus'' is ''a bus with 7 or fewer designated seating positions rearward of the driver's seating position that are forward-facing or can convert to forward-facing without the use of tools and is not an over-the-road bus.'' (S3.) NHTSA excluded perimeter-seating buses that were not over-the-road buses from the seat belt rule because perimeter-seating buses are often used in shuttle operations.

However, after considering the comments, NHTSA has decided not to apply FMVSS No. 227 to perimeter-seating buses as a class. In the seat belt final rule, NHTSA applied the belt requirement to OTRBs with perimeter seating, and not to non-OTRB with perimeter seating, because of a statutory mandate to require the seat belts in *all* OTRBs. There is no such mandate about the applicability of FMVSS No. 227. NHTSA has discretion under MAP–21 (section 32703(b)) to determine whether a rollover structural integrity standard and an anti-ejection portal improvement standard meet the requirements and considerations of section 30111(a) and (b) of the Safety Act.[58] After considering section 30111(a) and (b), NHTSA has decided it would not be appropriate to distinguish between perimeter-seating buses depending only on whether they are OTRBs or not.

NHTSA developed its motorcoach safety plan to protect the public against unreasonable risk of death or injury in high-occupancy vehicles.[59] In the Executive Summary in NHTSA's 2013 seat belt final rule, NHTSA stated: ''One of the guiding principles NHTSA considers in determining the priorities of our rulemaking projects is to protect the public against unreasonable risk of death or injury in high-occupancy vehicles. In 2007, NHTSA published a comprehensive plan to research improvements to bus safety, entitled, 'NHTSA's Approach to Motorcoach Safety.' '' [Footnote omitted.] In contrast, perimeter-seating OTRBs are low-occupancy vehicles compared to conventional inter-city buses that have primarily forward-facing seating. NHTSA has decided to exclude both OTRBs with perimeter-seating and non-OTRBs with perimeter-seating from this final rule, based on an absence of a safety need to include the buses. It is reasonable not to distinguish between the two kinds of perimeter-seating buses in applying the standard to the vehicles because of an absence of reasons to distinguish. This final rule treats both kinds of buses with perimeter seating (OTRB and non-OTRB) the same under FMVSS No. 227.

It should be noted that Hemphill and NiteTrain indicate that they obtain a bus ''shell'' from an incomplete vehicle manufacturer, such as Prevost.[60] Prevost manufactures both complete motorcoaches and incomplete vehicles (''shells''). The agency believes that, following establishment of this FMVSS No. 227, Prevost will offer for sale in the U.S. incomplete vehicle shells that meet the structural integrity requirements of ECE R.66 (the standard on which FMVSS No. 227 is based), because most of their final-stage manufacturer customers will produce buses that are subject to FMVSS No. 227. For customers that produce buses that are excluded from FMVSS No. 227, for liability and competitive marketing reasons, it would make little commercial sense to offer shells that do not meet ECE R. 66 to customers, or for customers to buy such shells. Thus, even if perimeter-seating buses are excluded from FMVSS No. 227, manufacturers will likely produce buses using these ECE R.66 shells, which will result in vehicles that provide significantly improved structural integrity in a rollover crash. When the bus superstructure is strengthened to meet FMVSS No. 227 there will be less deformation of the bus structure and reduced torsional loads on interior structures, such as partitions, and reduced risk of intrusion into the occupant space. This means that perimeter-seating buses, even though excluded from the standard, will provide enhanced structural integrity in a rollover. Hemphill commented that partitions will ''add support to the roof of our coaches and significantly increase the roof's integrity'' and will ''significantly reduce any intrusion into the survival space'' in a rollover. While the commenter did not provide data or evidence to support its claim, NHTSA concurs that minor modifications to the vehicle structure, such as by installation of partitions, will not degrade the integrity of the superstructure of the bus, and that even these perimeter-seating buses will provide protection against roof collapse in a rollover.

Prison Transport Buses

The NPRM proposed to apply FMVSS No. 227 to prison transport buses (78 FR 70416). MCI, a manufacturer of prison transport buses, disagreed with this proposal. MCI expressed concern about the need to partition these buses to provide cells, believing that each customer's unique cell configuration could affect the test results of the standard. MCI states it would not be practicable to fulfill a one-of-a-kind bus order by building a second bus for testing to meet MCI's certification responsibilities.

Agency Response

NHTSA agrees to exclude prison buses from FMVSS No. 227 but not for the reason given by MCI. Due to the nature of the vehicle type, prison vehicle interior configurations/partitions may vary considerably. However, NHTSA does not require the kind of certification burden MCI describes. A manufacturer does not have to build a replicate vehicle to test to enable the manufacturer to certify compliance with the standard. A discussion of various certification methods available to manufacturers can be found in the August 6, 2014 NPRM preceding this final rule (79 FR 46116–46117), and in the Regulatory Flexibility Act analysis below in this final rule.

NHTSA is excluding prison buses because the FMVSS No. 227 is not appropriate for the bus type. The agency does not know how many prison buses are manufactured each year, but does not believe there is a substantial number of such vehicles produced. Regardless of the number of vehicles produced, bus superstructures sold in the U.S. are likely to be strengthened to meet FMVSS No. 227 after this final rule becomes effective. With the strengthened superstructures, there will be less deformation of the bus structure and reduced torsional loads on interior structures, such as partitions. Thus, the agency has not found justification to apply FMVSS No. 227 to prison buses, as minor modifications to the vehicle structure, such as by installation of partitions, are unlikely to affect the structural integrity of the vehicles.

Double-Decker Buses

The NPRM proposed to apply FMVSS No. 227 to double-decker buses. Buses with open-roof sections would not have the open section assessed for compliance but the closed-roof sections would be. Double-decker buses with closed-roof sections on the lower and top levels would have both levels assessed for compliance. Since we saw no difference in the potential safety risks of double-decker buses and other large buses covered under our proposal, we proposed applying FMVSS No. 227 to the bus type.

[58] NHTSA is authorized under the Vehicle Safety Act to issue motor vehicle safety standards that ''shall be practicable, meet the need for motor vehicle safety, and be stated in objective terms'' (49 U.S.C. 30111(a)). When prescribing a motor vehicle safety standard, NHTSA considers, *inter alia,* relevant available motor vehicle safety information, whether a standard is reasonable, practicable, and appropriate for the particular type of motor vehicle or motor vehicle equipment for which it is prescribed, and the extent to which the standard will carry out the purpose and policy of the Act, *i.e.* , reduce traffic accidents and deaths and injuries resulting from traffic accidents (49 U.S.C. 30111(b)).

[59] 78 FR 70416, November 25, 2013. The preamble also makes repeated reference to ''high-occupancy'' buses in its analyses of crash data involving the subject buses.

[60] Incomplete vehicle manufacturers such as Prevost are large manufacturers.

Comments Received

NTSB and Coach USA (a large motorcoach operator) supported applying FMVSS No. 227 to double-decker buses. NTSB stated it would be appropriate to test the portions of the bus where bus structure could intrude on the vehicle occupants. Coach USA supported applying the same requirements to lower/enclosed sections of open-top double-decker buses, and stated that its double-decker buses already comply with the ECE R.66 test. In contrast, Van Hool stated that in Europe ECE R.66 can be applied to double-deckers only at the request of the manufacturer and referenced a document to argue that the number of fatalities that are attributable to double-decker buses is lower than those attributable to other buses.

Agency Response

This final rule applies FMVSS No. 227 to double-decker buses as proposed. Double-decker buses are being used for intercity/interstate transport of large numbers of passengers.[61]

We do not concur with Van Hool that there should not be a safety concern with double-decker buses. The document that Van Hool referenced to support its view consists only of meeting notes from a UN ECE informal working group meeting on ECE R.66.[62] The meeting notes stated that a representative from Spain presented information about bus crashes, but the notes did not include statistics about double-decker buses. Further, the notes included a point made by a person from the International Road and Transport Union expressing concern that the increased mass of the superstructure of a double-decker bus above the vehicle's center of gravity might suggest that the double-decker bus should be subject to the ECE R.66 requirements. We do not see any information in the meeting notes that suggested that the safety risk is lower for these types of buses.

Further, we believe that the design characteristics and physics of double-decker buses suggest that double-decker buses are at least as susceptible to the rollover crash risk as the other buses covered under this final rule. Double-decker buses can have GVWRs fifteen to twenty percent greater than single-deck OTRBs.[63] A Swedish study[64] on occupant fatalities in bus crashes concluded that—

> The height of a double-deck vehicle may be 60–80 [centimeters] higher than a corresponding single deck vehicle. In case of a rollover with a double-deck vehicle, the greater [the] distance from the [center] of gravity in the upper compartment[,] the greater [the] increase of the rotation velocity. This, in turn, will increase the [ground] impact [leading to] greater risk for injuries as a consequence.

Thus, the available information does not support Van Hool's contention that there is little crash risk associated with double-decker buses. While the agency seeks to harmonize with ECE regulations to the extent possible, we believe applying FMVSS No. 227 to double-decker buses will meet a safety need in this country. According to Coach USA, its double-decker buses already meet the ECE R.66 requirements, which illustrates the practicability of the buses'' meeting FMVSS No. 227.

This final rule makes a slight clarification in the regulatory text of FMVSS No. 227 relating to double-decker buses. The standard would not apply to a level of a bus that does not have a permanent roof over the level, such as the upper level of a double-decker bus that does not have a permanent roof over the upper level. However, a double-decker bus that is open-top in the rear half of the bus but permanently closed-top for the front half of the bus is subject to the requirements of FMVSS No. 227 for the front half of the top of the bus (as well as for the entire enclosed lower section of the bus).

IX. School Bus Derivative Buses

Daimler Trucks North America (DTNA)[65] and IC Bus, LLC (IC Bus) manufacture school and commercial buses and certify the vehicles to FMVSS No. 220, ''School bus rollover protection,'' and FMVSS No. 221, ''School bus body joint strength.'' The commenters suggest that NHTSA permit buses meeting FMVSS No. 221 the option of meeting FMVSS No. 220 rather than FMVSS No. 227. They state that the buses are similar in appearance to school buses but are sold for non-school related purposes. The commenters contend that the operating environment for these buses is closer to that of school buses than intercity buses and that the vehicles should be subject to the school bus safety standards for rollover protection (FMVSS No. 220) and joint strength (FMVSS No. 221) rather than FMVSS No. 227.

Agency Response

We agree with the commenters and have excluded school bus derivative buses from FMVSS No. 227. This is because the buses already provide a survival space by meeting FMVSS No. 220, ''School bus rollover protection,'' and do not need to meet the requirements of FMVSS No. 227.

FMVSS No. 227 defines ''school bus derivative buses'' in a manner reflecting that the buses are built on a school bus platform for sale in the U.S. The buses have safety systems that are identical to school buses regarding their fuel systems, bus body joint strength, emergency exits and roof crush resistance. The vehicles could be certified as meeting the FMVSSs for ''school buses'' if they had seating systems meeting FMVSS No. 222, ''School bus seating and passenger protection'' (49 CFR 571.222), and school bus lights and stop arms meeting FMVSS No. 108 and No. 131, respectively. NHTSA is excluding the buses to avoid redundancy in the FMVSSs. Thus, the definition is designed to exclude only vehicles that could be certified to the school bus FMVSSs and not other large buses.

DTNA and IC Bus argue that their school bus derived commercial buses operate under conditions more similar to those of school buses than OTRBs. The ''applications'' in which the commercial buses are used are described by DTNA as ''church activity, retirement community, college campus, boys and girls club, parks and recreation department and airport shuttles.'' IC Bus echoes that description and adds ''support of emergency responders.'' NHTSA agrees that these applications describe usage that is more local in nature than that of intercity OTRBs. NHTSA recognizes, however, that once purchased, operators of the vehicles could use school bus-derivative buses in ways other than that described by DTNA and IC Bus, so in analyzing the commenters'' suggestion NHTSA must consider the likelihood that the buses may not be used like school buses.

It is a fact that FMVSS No. 220 has a record of rollover safety in school buses. The standard has been applied to school buses since 1977. School bus derivative buses are already manufactured to meet the school bus roof crush resistance

[61] See *e.g.,* Megabus website, *http://us.megabus.com/, last accessed October 24, 2016.*

[62] *https://www.unece.org/fileadmin/DAM/trans/doc/2008/wp29grsg/GRSG-95-07e.pdf* (last accessed Feb-23–2017).

[63] Van Hool TX Luxury Touring Coach GVWRs are 50,700 lb (40″ vehicle length) and 54,000 lb (45″ vehicle length). Van Hool TD925 double-decker buses are GVWR 62,000 lb (45″ vehicle length). Vehicle data from *https://www.abc-companies.com/,* last accessed October 24, 2016.

[64] Albertsson, Pontus; Occupant Casualties In Bus And Coach Traffic; 2005; ISBN 91–7305–829–7.

[65] DTNA states that it manufactures school buses under the Thomas Built Bus brand.

requirements in FMVSS No. 220. NHTSA believes these buses already have improved roofs and roof supports that substantially improve the resistance of the roofs to deformation and intrusion compared to buses that do not meet FMVSS No. 220.[66] To avoid redundancy in the FMVSSs, this final rule permits these buses the option of meeting FMVSS No. 220 when tested in accordance with the test procedures of FMVSS No. 220, instead of the ECE R.66-based rollover test requirements of FMVSS No. 227.

The agency is not permitting buses other than school bus derivative buses to meet FMVSS No. 220. Buses other than school bus derivative buses have been designed such that they have a higher center of gravity and/or utilize larger windows than school buses. These characteristics can lead to a higher incidence of occupant ejections during rollovers. Thus, the dynamic rollover test in ECE R.66 affords the agency an opportunity to set a minimum level of performance for the ejection-mitigating features of non-school bus derivative buses, such as emergency exits closure and side window glazing retention during a rollover crash.

X. Performance Requirements

The NPRM proposed performance requirements that buses must meet when subjected to a tilt rollover test. In the proposed test, the bus is placed on a tilting platform that is 800 mm (31.50 inches) above a smooth and level concrete surface. One side of the tilting platform along the length of the vehicle is raised at a steady rate of not more than 5 degrees/second until the vehicle becomes unstable, rolls off the platform, and impacts the concrete surface below with its roof leading edge. The major points of this testing method involve a quarter-turn roll of the bus onto its side (so that it strikes the top corner of the bus superstructure on a rigid surface) and ballasting the vehicle to simulate the load that the bus would be carrying in a rollover crash. This test creates a high-severity test condition that encompasses the majority of real-world bus rollovers.

[66] In addition, as DTNA and IC Bus point out, the vehicles also meet FMVSS No. 221, which adds to the structural integrity of the vehicles. The purpose of FMVSS No. 221 is to reduce deaths and injuries resulting from the structural collapse of school bus bodies in crashes.

a. Severity of the Rollover Test

EPGAA, Advocates, the families of bus crash victims (the families), and Ms. Stoos, express concern that the proposed test evaluation is not severe enough to replicate the conditions of real-world bus rollovers. The families and Advocates state that the rollover test should include: Vehicle rollovers greater than 90 degrees (one quarter roll); high vehicle speed prior to rollover; embankments; and impacts that may occur after the rollover. Advocates references a 2007 glazing retention test development study commissioned by NHTSA and Transport Canada to illustrate its point (''Motor Coach Glazing Retention Test Development For Occupant Impact During A Rollover,'' Martec Technical Report # TR–06–16, Rev 4, August 2006 (''Martec study'')[67]).

Agency Response

NHTSA does not agree with the commenters' argument that FMVSS No. 227's test is not a reasonable representation of a severe rollover crash. As discussed below, research papers, test reports, simulation analyses, and reports on the efficacy of the ECE R.66 test support the implementation of the test.

FMVSS No. 227's test is highly stringent, accounting for the potential real-world rollover crash forces that are imparted on the bus superstructure in a rollover crash. The test creates a force near the top corner of the bus in the transition from the sidewall to the roof. This application of force is representative of a bus rolling over into a drainage ditch along a highway; however, in the FMVSS No. 227 test, the bus strikes a hard surface that is more rigid than the typical earthen drainage ditches along the roadside. The hard surface results in the energy from the rollover being absorbed by the bus and not shared between the bus and the ground. This hard surface contact makes FMVSS No. 227's rollover test more stringent than similar rollovers into earthen embankments. Matolcsy, M. (2007), ''The Severity of Bus Rollover Accidents,'' 20th International Technical Conference for the Enhanced Safety of Vehicles, Paper 989, Lyon, France.[68] The test also gives the agency a repeatable, reproducible, and practical method to evaluate bus structural integrity during rollover crashes.

[67] Docket No. NHTSA–2002–11876–0015.

It can appear to the eye that crashes involving multiple quarter-turn rolls along the ground are more severe than a single quarter-turn rollover onto rigid pavement that ends instantly, all other things being equal. The significant difference is that the multiple quarter-turn roll loads an entire side, then the roof, then the other side, next the wheels/suspension/floor, and so on until the bus comes to a rest. The multiple quarter-turn rollover dissipates the crash energy across major portions of the vehicle structure over a relatively long duration. The vehicle structure in a multiple quarter-turn crash is not managing or absorbing all of the crash energy at once. Single quarter-turn rollovers, in which the crash forces are reacted over a short duration by relatively weak localized components of the vehicle structure, require the entire vehicle structure to be stronger. Therefore, the more stringent rollover test is one in which the energy of the crash is applied instantaneously, such that the vehicle needs to manage and absorb all the energy applied at the same time.

The demanding nature of the ECE R.66 test incorporated into FMVSS No. 227 is discussed at length in the 2007 report, which evaluated the sufficiency of the test for adoption into R.66.[69] The report's author notes that early work on ECE R.66 considered different types of rollover scenarios during deliberations to ''find an appropriate standard approval rollover test.'' For the issue of conducting a test with multiple turns (*i.e.*, the bus rolling more than a quarter-turn), the study concluded that the ECE R.66-based test imparts more loads on the bus superstructure than other potential tests that included multiple turns. This was found even though the tests with multiple turns began with a bus raised higher from its final end of test resting place—*i.e.*, the other tests began with greater potential energy than the ECE R.66-based test.

Figure 3, below, shows the three rollover tests that were analyzed during development of ECE R.66.

[68] Available at: *https://www-esv.nhtsa.dot.gov/Proceedings/20/07-0152-O.pdf.*

[69] Matolcsy, M. (2007), *supra.*

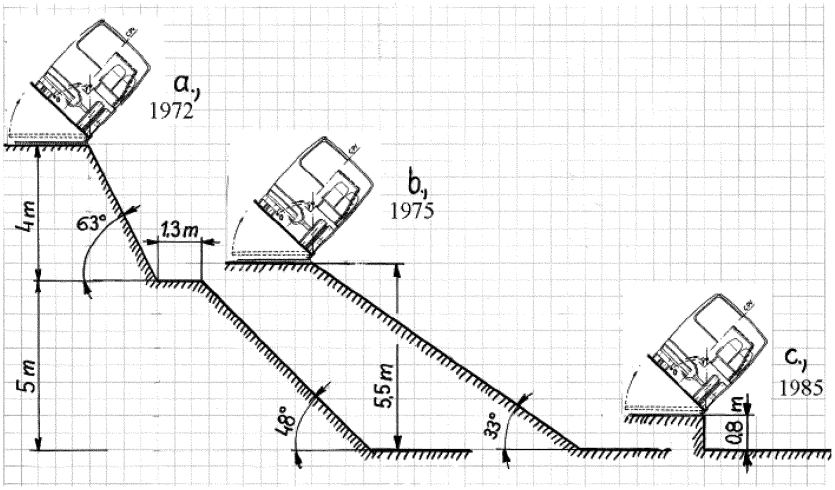

Figure 3: Three different rollover tests Hungary[70] evaluated for ECE R.66 development.

Test conditions "a" and "b" produce an initial contact between the bus and ground that may distribute the crash load into more of the bus sidewall structure than test condition "c." Test condition "c" concentrates the initial rollover impact load into the upper outer corner of the bus superstructure.

The study compared the quarter-turn ECE R.66 test to other tests in which the bus traveled a greater distance during the test and rolled multiple times. The research conducted a series of tests under three test scenarios using the same bus type. In the end, the research showed test ''c,'' which is essentially ECE R.66, produced results that imparted the greatest loads on the bus superstructure. The test series further showed that bus reinforcements to provide survival space in test ''b'' needed further reinforcement to provide sufficient survival space in test ''c.'' From these data, it was found that, while a test could simulate a crash with more total energy (*e.g.*, test conditions ''a'' and ''b'' under which the bus begins the test with higher potential energy), the long dissipation of that energy over multiple rolls during the crash significantly reduces the damage imparted to the bus superstructure during the test.

NTSB and Advocates request that the agency consider a test involving more than a quarter-turn rollover. The commenters did not elaborate on how many more turns of a vehicle rollover they would like the agency to adopt. The agency has no data on the number of quarter-turns that occur in a bus rollover since the FARS database does not capture that crash detail. Nonetheless, the Matolcsy report, *supra*, explains how buses developed to meet the requirements of ECE R.66 have maintained survival space when those buses have experienced rollovers beyond a quarter-turn and down embankments. This information suggests that FMVSS No. 227 will lead to buses capable of providing bus passengers with a survival space and lowered risk of ejection during rollover crashes greater than a quarter-turn.

The Matolcsy report provides additional examples of real-world improvements manufacturers have made to buses in response to ECE R.66 requirements, including photographs of how bus interior compartments looked post-crash before and after application of ECE R.66 to the vehicles. A bus that was not designed to comply with ECE R.66 experienced structural collapse in a rollover crash with one and a half full 360 degree rolls down a 6-meter embankment similar to the one depicted above in Figure 3(b). In contrast, a bus designed to meet ECE R.66 requirements was able to maintain adequate survival space in a rollover crash with two and a quarter full 360 degree rolls down a 9–10 meter embankment similar to the crash depicted in Figure 3(b) above.

In its comments, Advocates references a research project on motorcoach window glazing in which the research used finite element (FE) models to compare the loads on the bus structure in different simulation tests where the bus carried different lateral speeds into its crash with the impact surface.[71] The simulation scenarios in the research included: (1) No lateral speed with 800 mm drop (replicating ECE R.66), (2) 30 kilometers per hour (km/h) lateral speed with 400 mm drop, and (3) 30 km/h lateral speed with 800 mm drop.[72]

Advocates refers to a statement by the researchers that the ECE R.66 test is not the most stringent test condition. NHTSA notes that the statement reflected only a preliminary finding of Phase I of the study and was later corrected.[73] The preliminary results in Phase I were refined in Phase II of the study. After improving their analysis methodology and conducting the simulation again in Phase II, the researchers conclude that the ECE R.66 test is the more stringent test when compared to tests that incorporated a lateral speed.[74] As can be seen in the Table 12 data, the ECE R.66 rollover produced higher rollover contact forces than rollover simulations with the ECE R.66 drop height and an initial lateral velocity.

[70] *Id.*

[71] *See* Comment from the Advocates for Highway Safety, Docket No. NHTSA–2014–0085–0016, page 5 and 6. The comment references the 2007 NHTSA report, *National Motor Coach Glazing Test Development for Occupant Impact during a Rollover.* (NHTSA–2002–11876).

[72] *See* Martec Technical Report # TR–06–16; ''Motor Coach Glazing Retention Test Development For Occupant Impact During A Rollover,'' (Joint NHTSA and Transport Canada Program; Final Report); Docket No. NHTSA–2002–11876–0015.

[73] The authors stated that the models used for the first phase were not detailed and were ''only expected to provide rough-order-of-magnitude roof/ground [contact] forces.''

[74] *Id.*

TABLE 12—COMPARISON OF ROOF IMPACT FORCES [75]

	Rollover Scenario					
	No. 1 (ECE R.66)		No. 2 (400 mm)		No 3. (800 mm)	
	Phase I	Current	Phase I	Current	Phase I	Current
Contact Surface	Roof perimeter	Window Posts	Roof Perimeter & Window Posts.	Window posts	Roof Perimeter	Window Posts.
Peak contact Force (N)	4,065,900	2,831,593	4,538,964	2,468,656	3,920,160	2,696,370.
Average Impact Force (N)	1,481,100	1,219,995	2,271,342	891,627	1,960,137	1,149,529.

When a bus traveling at highway speeds tips and begins a multiple-turn roll, the energy in the crash will not be completely transferred to the vehicle structure at the first impact. A significant portion of the energy will go towards sustaining the rolling motion of the bus. Thus, while the vehicle would sustain more impacts during this extended rollover crash, the loads on the superstructure would be lower than the ECE R.66-based test. Further, even if the bus turned only once at highway speed, landed on its side, and slid on the side, the single impact at highway speed would load an entire side of the bus structure, rather than just a corner of the bus superstructure. This flat-faced, wide application of the load dissipates the energy and enables the bus to better withstand the load than the more stringent concentrated load application of FMVSS No. 227. The friction from the sliding of the bus on the surface of the ground also dissipates the kinetic energy of the crash over a longer period—further reducing the load on the vehicle superstructure In short, FMVSS No. 227 presents a severe real-world application of crash loads on the superstructure, and does so in a controlled, objective manner appropriate for an FMVSS compliance test.

Advocates also discuss a crash variation where the bus may hit an embankment or other ''vertical surface'' type object. This crash variation may or may not increase the total energy to be dissipated during the crash, but the load concentration may change. However, even with different potential objects loading the structure, we believe that the loads to which the superstructure is subjected might be similar in some respects to the loading to which the superstructure is exposed when tested under FMVSS No. 227. While no embankment or other ''vertical surface''-type object is a part of the test, the vehicle superstructure's loading during the test is akin to the concentrated force that is applied when striking a ''vertical surface.'' The test involves loading the entirety of the energy in the test onto a concentrated section of the structure (*i.e.* , the corner of the roof). Thus, we believe that FMVSS No. 227 reflects an aspect of the ''vertical surface'' and other crash variations about which Advocates is concerned.[76]

For the above reasons, NHTSA concludes that the ECE R.66-based test adopted in this final rule is an effective high-stringency test. The test substantially increases the likelihood that large buses will withstand the crash forces in a real-world rollover crash and provide a survival space to occupants.[77] FMVSS No. 227 addresses motorcoach crashes that are more than quarter-turn crashes, without having to expose the vehicles to the exact same conditions. Given that all available information indicate that the FMVSS No. 227 test sufficiently replicates a deadly rollover crash, we are adopting the ECE R.66-based test in this final rule.

b. Intrusion Into the Survival Space

The NPRM proposed to prohibit intrusion into the ''survival space,'' demarcated in the vehicle interior from approximately the rear wall of the bus to 600 mm (24 inches) in front of the front surface of the seat back of the front row seats, by any part of the vehicle outside the survival space.

The purpose of the proposal is to guard against inadequate survival provided to occupants, especially belted ones, due to collapsing sidewalls, roof structure, or other objects. We intended the requirement to complement our standard requiring seat belts for passengers on the subject buses, to ensure that passengers retained in their seats will have a survival space protecting them from collapsing vehicle structure. Our research found structural intrusions into the survival space in the tested MY 1991, MY 1992, and MY 2000 buses. The NPRM proposed to define the vehicle survival space in a specific manner (see S4 of the proposed standard, 79 FR 46119–46120). The NPRM also proposed use of ''survival space templates'' in the compliance test.

Overall, commenters concurred with the survival space concept, suggesting small changes to the proposal.

MCI suggested that the survival space requirements should account for variations in vehicle floor heights so that the same height space can be provided in each vehicle segment. MCI requested survival space be defined relative to the forward and rear floor height of each segment of the vehicle.

NHTSA does not believe there is a need to change the survival space definition in response to MCI. The survival space definition already accounts for variations in interior compartment floor height front-to-rear and side-to-side in the vehicle.

However, the agency does believe it should clarify two ambiguities in the survival space definition. First, the ''survival space'' definition is clarified by defining ''occupant compartment'' to mean a space within the vehicle interior intended for driver and passenger use, excluding any space occupied by fixed appliances such as bars, kitchenettes, or toilets. Second, the definition of ''survival space'' is made clearer with regard to a forward-most seat that is not forward-facing. The specification of the centerline used to locate the reference point for the transverse vertical plane was not entirely clear in the NPRM. The ''longitudinal'' centerline should be

[75] *Id.*, table from report, page 14.

[76] NHTSA also notes that, at this time, the petitioner's request to incorporate vertical surfaces to mimic a motorcoach accident scenario is impractical to meet. To adopt an objective, repeatable and meaningful test maneuver that incorporates highway speeds and vertical surfaces for the bus to impact, NHTSA should have additional information on what speed is representative, how to trip the bus to initiate a roll, what vertical surface objects are representative, etc. Such information is now unavailable. Further, a test incorporating highway speeds and vertical surfaces is currently not practical as the test conditions are exceedingly difficult to replicate, and pose inordinate safety risks to technicians conducting the test.

[77] Advocates also points to an NTSB Preliminary Report on a crash of a 1996 Setra Motorcoach operated by AM USA Express, Inc. Comparing the image of that bus (post-crash) in the NTSB Preliminary Report to a bus that NHTSA tested using ECE R.66 in research. Advocates argues that the ECE R.66 test fails to represent real-world crash conditions. Advocates does not present any information regarding the roof structures of these vehicles and whether their structures are similar enough to compare the severity of the crash conditions. There is insufficient information to make any reasonable conclusions comparing the crash severity in these two cases.

specified for the most forward point on the most forward seat. Further, the direction that the most forward seat faces will affect the relative positioning of the transverse vertical plane to this seat. This final rule therefore modifies the definition of survival space to specify that the front boundary of the survival space is a transverse vertical plane determined relative to the most forward seat [78] in the passenger deck when the seat is in its forward-most position and its seat back is in the manufacturer's nominal design riding position. This transverse vertical plane is, (1) for a forward-facing seat, 600 mm in front of the most forward point on the longitudinal centerline of the front surface of the seat back, (2) for a rearward-facing seat, through the most forward point on the longitudinal centerline of the seat back, and (3) for a side-facing seat, through the most forward point on the seat, including the seat back, seat arm rest, and seat cushion.

Intrusion of Items Into the Survival Space

MCI expresses concern that small glass shards falling from a window into the survival space may be a failure per the language of S5.1 [79] of the NPRM.

That was not NHTSA's intent in issuing this rule, but the agency agrees the proposed language could be read to produce such an outcome. NHTSA's intent in maintaining a survival space was to ''set a minimum level of structural integrity for these buses, to help prevent dangerous structural intrusions into the occupant survival space.'' [80] The intent of the survival space requirement was to ensure ''that the roof and sidewalls will be able to withstand the racking forces of a rollover crash.'' [81] The purpose of retaining the window glazing to its mounting structure was to ''ensure that the vehicle's structural integrity will prevent heavy glazing panels from falling into the passenger compartment and becoming ejection portals.'' [82] We used ''massive'' and ''heavy'' to describe the window glazing panels and discussed a need to ''[reduce] risk of injury from falling panels of glazing and occupant ejections.'' As NHTSA's intent was not to require protection from ''small glass shards'' during the bus rollover, this final rule has clarified the requirements to reflect this view, as discussed below.

NHTSA is providing in FMVSS No. 227 that objects of a minute size may intrude into the survival space. As to the size of the objects, the commenters do not provide a suggested definition for ''small glass shards.'' NHTSA thus turned to analyzing the Federal glazing standard to determine how the standard describes acceptably ''small'' glass shards regarding occupant safety. Glazing material used in motor vehicles must meet the requirements of FMVSS No. 205, ''Glazing materials'' (49 CFR 571.205). FMVSS No. 205 specifies that ''[g]lazing materials for use in motor vehicles must conform to ANSI/SAE Z26.1–1996'' [83] unless FMVSS No. 205 provides otherwise.

ANSI/SAE Z26.1–1996 allows ''small particles'' to disengage from the glazing material during some of the laminated glazing [84] impact tests, though there is no express definition of ''small particles'' in ANSI/SAE Z26.1–1996. There is a 227 g (0.5 lb) 9.14 m (30 feet) ball drop impact test [85] in the ANSI standard for laminated glazing. The ball drop test allows ''total separation of glass from the reinforcing or strengthening material'' that does ''not exceed 1935 square millimeters (mm ^{2}) (3 square inches (in ^{2})) on either side.'' (During the rollover testing the agency conducted in support of the FMVSS No. 227 NPRM, laminated glazing panels did shatter, but no discernable amount of the glazing material came free from the interlayer material.)

The ANSI/SAE Z26.1–1996 maximum glazing separation size of 1935 mm ^{2} (3 in ^{2}) for laminated glazing evaluated using the ANSI ball drop test is helpful in indicating ANSI's determination of the maximum size of glazing that may enter the survival space without causing injury. Glazing pieces 1935 mm ^{2} (3 in ^{2}) or smaller are not massive or heavy, and the likelihood that they will cause serious blunt trauma injury is significantly lower compared to contact with an entire 84 kg (185 lb) glazing panel in a crash.

However, NHTSA further considered MCI's comment that ''a failure of a single fastener (such as a rivet) that is part of the attachment of the parcel rack assembly could be deemed a failure of the test.'' The agency decided that small items other than glazing pieces (*e.g.* , a bolt) should be allowed to enter the survival space if small glazing pieces are allowed. Given that the potential for injury caused by pieces entering the survival space is a function of the mass of the item, we decided to limit the items allowed to enter the survival space by the mass of the item.

As to what that mass should be, we again turned to ANSI/SAE Z26.1–1996 and glazing characteristics to start. The ANSI standard permits pieces of laminated glazing of 1935 mm^2 (3 in^2) to separate (break off) in the 227 g (0.5 lb) 9.14 m ball drop impact test. We estimate that laminated glazing has a glass thickness of approximately 2.5 mm for each glass layer, and a glass density [86] of about 0.00251 g/mm^3 (1.445 ounce (oz)/in^3). Thus, a piece of laminated glazing of 1935 mm^2 (3 in^2) has a mass of approximately 12 grams (g) (0.43 oz). Factoring in a 3 g (0.11 oz) tolerance, we are prohibiting intrusion into the survival space by any part of the vehicle outside the survival space other than items with a mass of less than 15.0 grams (0.53 oz). Tempered glazing shatters into tiny pebbles that are significantly smaller and lighter than pieces of broken laminated glazing. The shattered pieces of tempered glazing would weigh significantly less than 15.0 grams (0.53 oz).

C. Luggage Racks and Seat Anchorages

As discussed above in this preamble, the NPRM proposed to prohibit any anchorage of an interior overhead luggage rack or compartment or anchorage of a vehicle seat from completely separating from its mounting structure during the movement of the tilting platform or resulting from impact of the bus on the impact surface. After reviewing the comments, NHTSA has decided not to adopt the proposed requirements.

Under the NPRM, those proposed prohibitions would have applied even if the luggage rack does not enter the survival space, or the seat anchorages dislodged within the survival space. NHTSA has decided that the primary purpose of this rulemaking is to establish a roof strength and crush resistance standard that improves the resistance of roofs to deformation and intrusion, *i.e.*, by providing a survival

[78] This seat could be a passenger seat, the driver's seat, or a temporary (jump) seat.

[79] 79 FR 46120. The NPRM proposed the following regulatory text (S5.1): No part of the vehicle which is outside the survival space shall intrude into the survival space during the movement of the tilting platform or resulting from impact of the vehicle on the impact surface.

[80] 79 FR 46092, August 6, 2014.

[81] *Id.*

[82] *Id.*

[83] American National Standard for Safety Glazing Materials for Glazing Motor Vehicles and Motor Vehicle Equipment Operating on Land Highways-Safety Standard (ANSI/SAE Z26.1–1996).

[84] The requirements for the tempered glazing fracture test in the American National Standards Institute (ANSI) standard require that ''no individual fragment free from cracks and obtained within 3 minutes subsequent to test shall weigh more than 4.25 gram (g) (0.15 ounce (oz)).''

[85] ANSI/SAE Z26.1–1996, S5.12

[86] Glass density value from *https://www.saflex.com/en/AutoReduceVehicleWeight.aspx* I couldn't access this 4/20/20.

space to occupants in rollovers. The purpose is achieved by prohibiting *any* structure, such as overhead luggage racks, from intruding into the survival space. By prohibiting overhead luggage racks from impeding into the survival space in the rollover, overhead luggage racks will have to be better anchored to the bus wall than they had been in the past so that they do not detach and intrude into the survival space in the test. Thus, the proposed luggage rack provision is not needed to provide a survival space, since luggage racks are prohibited from intruding into the survival space. By being securely anchored so that they do not fall into the survival space, luggage racks will be less likely to impede egress in an emergency, or fall and cause head and neck injuries to occupants.

NHTSA has decided against adopting the NPRM's proposal that seat anchorages must not become dislodged during the test. The agency believes the seat anchorage provision is not necessary to achieve a survival space for occupants. NHTSA proposed the requirement for the retention of seat anchorages because of the agency's test of the MY 1991 Prevost LeMirage bus. [87] In the test, all seats on the opposite side of the impact detached from their sidewall mounting. A seat with a restrained mid-size adult male dummy completely separated from its anchorages and fell across the bus with the restrained dummy attached to the seat. NHTSA believed at the NPRM stage that the failure of the seat anchorages during the rollover test presented a significant safety risk to restrained occupants in bus rollover events and reduced the effectiveness of seat belts.

However, after considering the comments and other information, NHTSA concludes a requirement that the seat anchorages remain completely attached is unnecessary. In NHTSA's test of the MY 2000 MCI bus Model 102–EL3, all of the seats remained attached to their original anchorages. The seats were ballasted with either a 150 lb anthropomorphic ballast or with 150 lb steel weights, which is to say the seats remained attached even while tested under highly demanding conditions. This test of the MY 2000 MCI bus demonstrates that bus seat designs have improved since the MY 1991 and 1992 buses NHTSA tested in its test program.

Second, NHTSA believes the seat anchorage designs are likely to have improved even more since the design of the MY 2000 bus because of the agency's 2013 final rule requiring lap/shoulder belts on all large buses. The final rule requires the lap/shoulder belts to be integral to the bus seats, and that the belt anchorage, together with the seat anchorage, meet the rigorous strength requirements of FMVSS No. 210, ''Seat belt assembly anchorages'' 49 CFR 571.210. FMVSS No. 210 requires seat anchorages, attachment hardware, and attachment bolts to withstand loads of 13,345 N (3,000 lb) applied simultaneously to the lap belt portion and the shoulder belt portion of the Type 2 restraint system. Thus, the seat anchorages of new large buses meeting FMVSS No. 210 will be reinforced over and beyond the design of a MY 2000 bus, which reduces the likelihood even further that the seats will detach from the bus structure in a rollover as observed in the tests of the MY 1991 and 1992 buses. Thus, the proposed seat anchorage provision is not necessary to achieve a survival space for occupants.

d. Emergency Exits

The NPRM proposed that emergency exits must remain shut during the rollover test. The agency was concerned about emergency exits opening during a rollover, as NHTSA had observed this to happen in the tests conducted prior to the NPRM. The NPRM also proposed that roof and rear door emergency exits must be operable in the manner required under FMVSS No. 217, ''Bus emergency exits and window retention and release,'' after the test.

Comments Received [88]

EvoBus commented that the proposal that roof exits remain closed is unnecessary, as it did not know that any passenger has been ejected through the roof exit. TEMSA requested that NHTSA move the requirement that side emergency exits remain closed to proposed FMVSS No. 217a. NTSB requested that side emergency exit doors also be required to meet FMVSS No. 227. Advocates suggested the requirement should apply to all side exits.

Agency Response

In response to EvoBus, NHTSA has observed roof exits opening in the FMVSS No. 227 tests conducted in support of the NPRM. Their opening posed an ejection safety risk that this final rule now addresses. Crash data do not identify the portals through which occupants were ejected, so data records'' not indicating ejections through roof exits does not mean such ejections did not or will not occur. The final rule adopts a simple requirement that will reduce an ejection risk from open portals in the chaotic and unpredictable phases of a rollover. The cost of improved emergency latches is minor—$10 per coach for a total annual new bus fleet cost of $22,000. Congress, in enacting MAP–21, also wanted NHTSA to address the ejection risk from portals, and an opening in the bus roof caused by an open emergency exit poses an unreasonable risk of ejection of a child's head, limb or body, or those of an adult, in a rollover. NHTSA does not understand why design changes to the roof exits to enable them to meet the FMVSS No. 227 requirements would ''cause opening failures,'' nor did EvoBus explain its statement.

NHTSA does not agree with TEMSA that the requirements should be moved to FMVSS No. 217 or to the proposed FMVSS No. 217a. Both 217 and the proposed 217a do not address the dynamic torsional loads a bus structure transmits to the emergency exits during the rollover test in the manner FMVSS No. 227 does. Potential actuation of emergency exit latches due to inertial loading, assessed by FMVSS No. 227, is not assessed under current FMVSS No. 217 or proposed Standard No. 217a.

NTSB requests that FMVSS No. 227's requirements should also apply to side emergency exit doors. [89] NHTSA agrees, and had proposed that ''emergency exits [should] remain latched to avoid becoming an ejection portal for unrestrained occupants,'' [90] and that ''all emergency exits shall not open during the rollover structural integrity test.'' [91] The final rule adopts the proposal. However, NHTSA has decided not to require side emergency doors and emergency windows be operable after the crash test. The proposed provision that the exits must be operable after the test goes beyond purposes of the rulemaking (to provide a safe survival space and to reduce the risk of ejection through portals).

Further, there are challenges to requiring exits on the non-struck side to open with the bus on its side after the test. [92] FMVSS No. 217 specifies force

[87] A summary of the test may be found in the NPRM, supra, in section IV.b 79 FR 46100–46102.

[88] ABA requested an exclusion of entertainer buses from requirements in FMVSS No. 217, S5.2, ''Provision of emergency exits.'' The request is beyond the scope of the rulemaking and is not addressed in this preamble.

[89] Under FMVSS No. 217, emergency exit ''windows'' and emergency exit ''doors'' are considered ''emergency exits,'' whereas an emergency exit door is a specialized type of emergency exit. *I.e.,* not all emergency exits are emergency exit ''doors.''

[90] 79 FR 46109–46110.

[91] 79 FR 46110.

[92] This issue was discussed in the NPRM (79 FR 46110).

requirements needed to open the exit, calculated assuming the bus is upright on its wheels. FMVSS No. 217 only tests the subject buses when they are upright, so there are no gravity considerations. If the bus were tested on its side, the force requirement would have to be calculated to a yet-undetermined level to account for the mass of the window, the effect of gravity, and the fact that an occupant would be pushing on the exit while perched on seats they climbed on. NHTSA does not agree with Advocates that NHTSA should conduct an FMVSS No. 217 test after ''righting'' the bus on its wheels (buses are tested upright per FMVSS No. 217). The agency is concerned that righting the bus after the severe rollover test of FMVSS No. 227 may not be possible without further damaging the structural integrity of the bus. Further, conducting the test from inside the vehicle as per the FMVSS No. 217 test procedure would expose lab technicians to unreasonable safety risks.

XI. Glazing Issues

a. Side Glazing on the Non-Struck Side of the Bus

The NPRM proposed that each side window glazing on the non-struck side of the vehicle would have to remain attached to its mounting such that there is no opening that will allow the passage of a 102 mm (4 inch) diameter sphere when a force of no more than 22 N is applied.

This final rule does not adopt this provision. The sphere test was proposed to ensure that, after the rollover test, the glazing remain securely attached to its mounting. Because the primary purpose of this rulemaking is to provide a necessary survival space to occupants in rollovers, the purpose is achieved by prohibiting harmful panes of glazing from intruding into the survival space. The proposed requirement that the glazing remain securely attached to its mounting is redundant to the survival space specification and unnecessarily complicates this rulemaking. [93]

b. Type of Glazing

EPGAA, Greyhound and Advocates requested that the agency require advanced glazing material in bus windows, while Prevost, Van Hool, and EvoBus suggest that tempered glass should be permitted. Prevost expresses that ''there is a small possibility that some glazing could shatter when submitted to the proposed testing.'' Prevost and EvoBus request an exclusion of tempered glazing from the rule, or that shattered glazing not be considered a failure of the FMVSS No. 227 requirements.

Agency Response

The agency is not distinguishing among glazing types in FMVSS No. 227 or providing exclusions of tempered glazing. The standard is generally performance-oriented and technology neutral, requiring window glazing and surrounding window frame structures on the non-struck sides of the bus to be manufactured so as not to unsafely intrude into the survival space in the rollover test. As discussed above, this final rule accommodates intrusion of small pebbles of tempered glass into the survival space. This final rule makes allowances for minute objects weighing less than 15.0 grams to enter the survival space, in recognition that it may be difficult, and unnecessary, to keep more miniscule pieces of glazing and other items from entering the survival space in the FMVSS No. 227 rollover event.

The requirement in FMVSS No. 227 preventing bus components from intruding into the survival space is critical to rollover safety if the subject buses employ advanced glazing that mitigate the risk of occupant ejection in rollovers. NHTSA's research [94] found that advanced glazing, such as laminated glazing, could pop out of its mounting due to torsional deformation of the structure around the window. FMVSS No. 227's survival space requirement would improve the structural integrity around window frames and prevent glazing from popping out or otherwise detaching from its window mount in a rollover.

c. Moon Roofs

NTSB requested NHTSA consider including ''moon roofs'' in the glazing retention requirements of FMVSS No. 227. We agree with NTSB that ''moon roofs'' should be subject to the requirements of FMVSS No. 227, as there is a risk of passenger ejection through glass roofs during a bus rollover. Rather than use the term ''moon roofs'' however, hereinafter we use the term ''roof panel/windows'' since the latter term is more descriptive and inclusive of the components we seek to address.

Ejections through the roof occur in real-world crashes. From 2000–2009, two-thirds of the rollover fatalities in the subject buses were ejected occupants.[95] Two of the crashes (Turrell, Arkansas in 2004 and Mexican Hat, Utah in 2008) discussed in the NPRM involved roof separation from the bus. Almost all the passengers in those two crashes were ejected due to the loss of the bus roofs. In such crash events, unrestrained passengers can still be ejected if a bus that meets the survival space requirements fails to keep roof panels/windows closed or intact. We believe that manufacturers can use the same countermeasures to retain roof panels/windows to the glazing frames that they use to keep side window glazing attached to the side window frames.

MAP–21 [96] defines a portal as ''any opening on the front, side, rear, or roof of a motorcoach that could, in the event of a crash involving the motorcoach, permit the partial or complete ejection of any occupant from the motorcoach, including a young child.'' Roof panels/windows are portals per the MAP–21 definition. Any bus opening containing glazing material is a portal that can become an opening through which bus occupants may be partially or completely ejected if the glazing detaches from its mounting. The final rule's including roof panels/windows in FMVSS No. 227 accords with MAP–21. We will evaluate roof panels/windows like we do side windows. *I.e.*, no portion of a roof panel/window may enter the survival space, except for objects weighing less than 15.0 grams, and they must remain closed.

d. Struck-Side Window Evaluations

Several commenters (Advocates, Greyhound, NTSB, the families, and Ms. Stoos) request that the agency evaluate windows on the struck side as well as the non-struck side of the bus.

Under FMVSS No. 227, the agency can roll either side of the bus. Thus, manufacturers must ensure that vehicles can resist the torsional loads imparted into the structure on either side of the bus. To the extent the commenters suggest the sphere test should be conducted on the struck-side windows

[93] Some commenters objecting to the sphere test misunderstood the purpose of the test. The test was not intended to simulate an unbelted passenger's impact onto bus window glazing during a bus rollover. The sphere test was intended simply to measure whether the bus structure retained the glazing panels in the window frame when subjected to a rollover. In the final rule, this would be assessed by the prohibition that no large object enter the survival space. While retention of the glazing in its mounting could reduce occupant ejection, whether the glazing forms an opening through which an ejection could occur in a rollover crash, is the subject of NHTSA's proposed FMVSS No. 217a and will be addressed in the context of that rulemaking. 81 FR 27904, May 6, 2016, *supra.*

[94] Martec Limited, ''Motorcoach Glazing Retention Test Development For Occupant Impact During a Rollover,'' August 2006; Docket No. NHTSA–2002–11876–0015.

[95] 79 FR 46098; August 6, 2014.

[96] See Sec. 32072, *supra.*

when the bus is resting on the ground, as discussed above the agency is not adopting the sphere test, or any test involving lab technicians entering the rolled vehicle to assess compliance with a requirement.

XII. Test Procedure Issues

a. Ballasting the Vehicle

To simulate a real-world rollover incorporating foreseeable conditions that are challenging to the vehicle, NHTSA proposed to subject the vehicle to the forces resulting from the mass of restrained occupants. To achieve this, the NPRM proposed (in S6.2.5 of the regulatory text) that a mass up to 68 kg (150 lb) (ballast) be secured in each designated seating position (DSP) equipped with a seat belt.[97] The ballast would represent the mass of an ''average'' occupant, and is the mass NHTSA uses in determining a vehicle's GVWR per 49 CFR part 567, ''Certification.'' NHTSA stated that ballasting is important because it increases the weight and center of gravity of the vehicle, which better simulates the forces on the vehicle structure in a rollover when the seats are occupied by belted passengers. Also, when occupants are belted into the vehicle, their mass imparts crash forces to the seat anchorages during a crash, which NHTSA sought to replicate in the test (79 FR 46105–46107).

The agency indicated in the NPRM that it did not believe the method of ballasting or type of ballast used were of importance, as those factors will not significantly alter the forces imposed on the vehicle structure or the seat anchorages during compliance testing, so long as the ballast is 68 kg (150 lb) at each DSP. NHTSA noted in the NPRM that the NPRM differed from ECE R.66 on this issue of ballasting. ECE R.66 specifies the option of two different methods of securing occupant ballast to the passenger seats.[98] It reduces the load to 34 kg (75 lb) when a fixed ballast is used (79 FR 46106). Further, it specifies a different ballasting method.[99]

Comments Received

Several bus manufacturers commented on the proposal, all requesting that we adopt the ballasting approach of ECE R.66 (*i.e.* , the anthropomorphic ballast at 68 kg (150 lb) and the fixed steel plate ballast at 34 kg (75 lb)).[100] All the commenters essentially argue that passengers in a bus, restrained by the seat belts, will not transfer their entire load onto the seat anchorages and bus structure in the same way as fixed ballasts. Therefore, commenters argue, when using the fixed steel plate ballasts, the ballast weight should be 34 kg (75 lb) (*i.e.* , 50 percent of the weight for anthropomorphic ballasts).

In support of their view that a 50 percent weight is appropriate for fixed ballasts, the commenters argue that ECE R.66 considers a 75-lb weight for fixed steel ballasts equivalent to the 150-lb anthropomorphic ballast secured with the seat belt. Van Hool cites an ECE Ad Hoc Expert Group document that puts the load transferred by belted occupants to the vehicle structure as between 0 and 100 percent of the standard passenger mass of 68 kg (150 lb).[101] Prevost and Daimler both cite an ECE analysis finding that 50 percent of the restrained occupant's weight transfers to the bus structure during a crash.[102]

Agency Response

NHTSA is adopting the provision to use the 68 kg (150 lb) ballast in NHTSA's compliance test. NHTSA does not concur that a 75-lb (50 percent lighter weight) fixed ballast would simulate a similar amount of force on the seat anchorages and bus structure as a 150-lb occupant.

Prevost's and Daimler's comments reflect the state of knowledge in 2001, a time early in the development of ECE R.66. According to their cited analysis, there were no experimental data available at the time to evaluate the percentage of mass that should be included in the test. At that time, it was then theorized that 50 percent of the occupant weight was an appropriate estimate for the weight that a restrained occupant would transfer to the bus structure. However, subsequent published studies have found that the 50 percent value grossly underestimates the amount of force imparted by restrained bus occupants.

As discussed in the NPRM (79 FR 46106), an Australian study that utilized bus section testing and computer simulations [103] estimated that 93 percent of a lap/shoulder belt-restrained occupant mass, 75 percent of a lap belt-restrained occupant mass, and 18 percent of an unrestrained occupant mass are effectively coupled to the vehicle structure during a rollover. Further, a European Commission sponsored study in 2003 [104] found that the percentage of occupant mass coupled to the vehicle structure during a rollover is 90 percent for lap/shoulder belted occupants and 70 percent for lap belted occupants. Based on these research findings, NHTSA proposed in the NPRM to use the full weight of 150 lb (68 kg) at all DSPs.

Since the NPRM, NHTSA has learned about additional studies that corroborate the Australian and ECE findings. An

[97] All DSPs in the buses are required to have seat belts per our November 25, 2013 MAP–21 final rule amending FMVSS No. 208 (78 FR 70416).

[98] As discussed in the NPRM (79 FR 46107), we tested both types of ballasts, anthropomorphic (''water dummies'') ballasts and fixed steel ballasts, to determine the feasibility of each and the differences between the two. We found that the method of ballasting and type of ballast used were not important, as these factors did not significantly alter the forces upon the vehicle structure or the seat anchorages during the test, so long as the ballast is 68 kg (150 lb). Four commercially available ''water dummies,'' each filled with 68 kg (150 lb) of sand, were installed in one full row of seats (four seating positions) and were secured with ratchet straps that were configured to simulate Type 2 seat belts. Steel ballasts, 68 kg (150 lb) per seating position, were installed in a second full row of seats (four seats). In this row, steel plates were placed on top of each seat cushion and were secured with bolts that passed through the cushion and attached to a bar which clamped onto the seat frame. The overall center of gravity of the bus, and consequently, the energy absorbed in the test, was only slightly higher (less than 3 percent) when the water dummies were used compared to when the fixed weights were used. The differences in forces and moments generated at the anchorages due to the ballasts were also small.

[99] In addition to specifying a different weight for fixed steel plate ballasts, ECE R.66 requires the ballasts be fixed to the seat such that its center of gravity aligns with that of the anthropomorphic ballast (*i.e.* , approximately 100 mm forward and 100 mm above the seating reference point). However, NHTSA simply proposed to fix the steel ballasts to the seat because in the agency's research NHTSA found it difficult to position and fix the rigid weights per the ECE specification. We investigated whether affixing the rigid weights as specified by ECE R.66 is necessary and stated in the NPRM that it was not. The different center of gravity heights between the anthropomorphic ballasts and the fixed weight ballasts did not appear to affect the overall performance of the vehicle in the rollover test. 79 FR 46107.

[100] Greyhound Lines, Inc., an operator, suggested that NHTSA should ballast the overhead luggage racks during rollover testing. Ballasting of luggage rack and the lower luggage compartment of a motorcoach was not proposed in the August 6, 2014 NPRM and therefore the public was not provided a full opportunity to comment on this issue. ECE R.66 does not require ballasting of the luggage rack, and NHTSA does not see a safety need for a requirement to ballast the luggage racks.

[101] *See* Report about the Ad-Hoc Expert Group (AHEG) meeting dealing with the development of Regulation 66 (Frankfurt, 22–23, November, 2001), *available at https://www.unece.org/fileadmin/DAM/trans/doc/2002/wp29grsg/TRANS-WP29-GRSG-82-inf02.doc* (last accessed February 8, 2017).

[102] Study about the Incidence of the Use of Safety Belts with regard to Regulation 66 of Geneva, presented by Spain at the 81th Working Party on General Safety Provisions (GRSG), October, 2001, *https://www.unece.org/fileadmin/DAM/trans/main/wp29/wp29wgs/wp29grsg/grsginf/81/grsg81_inf09.doc* (last accessed February 8, 2017).

[103] Anderson, J., *et al.,* ''Influence of Passengers During Coach Rollover,'' Cranfield Impact Centre Ltd., 18th International Technical Conference on the Enhanced Safety of Vehicles, Nagoya, Japan, Paper No. 216, 2003.

[104] Enhanced Coach and Bus Occupant Safety (ECBOS), Project No. 1999–RD.11130, European Commission, 5th Framework, August 2003.

Italian study [105] reports that seat deformation is influenced by an occupant's weight during rollover testing. Reports co-authored by TEMSA [106] [107] conclude that 90 percent of the passengers' mass should be added to the rollover vehicle mass. Thus, the data cited by Prevost and Daimler appear to be outdated. Available studies now uniformly agree that more than 90 percent of the occupant mass is coupled with the bus during a rollover crash. Accordingly, we disagree with ballasting only 50 percent of the 150-lb occupant load.

For the above reasons, we are adopting the proposed language from the NPRM on ballasting. Using lower weight ballast for the fixed ballast, as suggested by some commenters, would not adequately simulate the loading conditions of the average restrained occupant.[108]

b. Vehicle Fluids

NHTSA specified that all fluids in the vehicle, including fuel, would be at maximum capacity during the test. For environmental and test personnel safety, NHTSA proposed to use substitute fluids to conduct the test if the weight of the original fluid was maintained.

Comments Received

Van Hool commented that NHTSA should not include vehicle fluid specifications and should permit manufacturers to replace parts of the bus representative masses. The commenter believed that manufacturers should be able to decide on these conditions and determine them for their bus if ''the basic features and behaviour [sic] of the superstructure are not influenced by it.'' Van Hool recommends that the agency use the ECE R.66 definition of cg to determine whether the manufacturer's selected vehicle conditions are appropriate for testing.

Agency Response

We have changed the regulatory text so that vehicle fluid fill levels are now specified as a percentage range of the maximum capacity rather than only as maximum capacity. FMVSS No. 227 specifies that the agency will test the bus with all fluids (or replacement fluids) at 90 to 95 percent of the maximum level for each of the fluids.

In specific response to Van Hool, NHTSA does not believe the requested change is necessary. Van Hool requested that NHTSA use manufacturer-defined test conditions for items such as the vehicle fluid levels and representative masses for expensive vehicle parts, if the manufacturer-specified conditions maintain a specified cg. As NHTSA explained in the NPRM, in the U.S., manufacturers self-certify their products'' compliance with the FMVSSs. The test conditions specified in an FMVSS specify the conditions under which NHTSA will assess compliance. The purpose of specifying these conditions is to give manufacturers notice of how NHTSA will test, not to prescribe the testing methods that manufacturers must use to certify compliance.

To illustrate, FMVSS No. 227 specifies that the agency will test the bus with all fluids (or replacement fluids) at 90 to 95 percent of the maximum level for each of the fluids. The standard does not require manufacturers to conduct the test under the same conditions. Manufacturers may use different testing methods to certify compliance with the FMVSSs. They must reasonably conclude that their vehicles will pass the FMVSS test when tested by NHTSA as specified in the FMVSS. It is not incumbent on NHTSA to specify in the FMVSSs all the possible testing methods a manufacturer might use as a basis for its certification.

c. Additional Tools for Survival Space Evaluation During Testing

Van Hool suggested that additional evaluation tools be permitted as supplemental or alternatives to the proposed survival space template, to simplify testing. It stated that high-speed photography, video, deformable templates, electrical contact sensors, and other suitable evaluation and techniques should be permitted as part of the standard.

After considering the comment, NHTSA has decided to change some of the language in the regulatory text of FMVSS No. 227 to provide more flexibility in the tools the agency will use to measure compliance. As stated in the NPRM, we intended that ''[o]ther tools could also be used to help determine whether there was intrusion into the survival space, such as deformable templates, high speed video, photography, or a combination of means. NHTSA could use templates and/or other means of determining whether intrusion occurred.'' [109] However, describing the use of survival space templates in detail in the regulatory text of FMVSS No. 227 implies the opposite, and makes unclear NHTSA's flexibility to use other compliance tools that are not described in the regulatory text. We believe it would be more efficient for the agency to move the specifications on the detailed use of templates or other methods to a test procedure document that NHTSA's Office of Vehicle Safety Compliance publishes.

XIII. Other Issues

a. ECE R.66 Alternative Compliance Methods

The rollover test in this final rule is based on the complete vehicle test from ECE R.66. NHTSA is not adopting ECE R.66's four alternative options for complying with ECE R.66 requirements.[110] The following options are considered by ECE R.66 to be equivalent approval tests: (1) A rollover structural integrity test of body sections representative of the vehicle, (2) quasi-static loading tests of body sections, (3) quasi-static calculations based on testing of components, and (4) computer simulation (finite element analysis) of a complete vehicle.[111]

Comments Received

Bus manufacturers already producing vehicles subject to ECE R.66 (Van Hool, TEMSA, Prevost, EvoBus) asked NHTSA to adopt the alternatives of ECE R.66. TEMSA believed that computer

[105] Belingardi, G., Martella, P., and Peroni, L., ''Coach Passenger Injury Risk During Rollover: Influence of the Seat and the Restraint System,'' 19th International Technical Conference on the Enhanced Safety of Vehicles, Washington DC, Paper No. 05–0439, 2005.

[106] Guler, M., Atahan, A., and Bayram, B, ''Effectiveness of Seat Belt Usage on the Rollover Crashworthiness of an Intercity Coach''; 21st International Technical Conference on the Enhanced Safety of Vehicles, Stuttgart, Germany, Paper No. 09–0205, 2009.

[107] Elitok, K., Guler, M., Bertan Bayram, B., and Stelzmann, U., ''An Investigation on the Roll-Over Crashworthiness of an Intercity Coach, Influence of Seat Structure and Passenger Weight,'' 9th International LS-DYNA Users Conference, 2006.

[108] NHTSA asked for comment on whether, when fixed ballasts are used, it is necessary to specify a specific center of gravity for the fixed steel plate ballasts. 79 FR 46107. No comments were received on this issue. For the reasons in the NPRM, NHTSA believes it is sufficient for the steel ballasts to be placed on top of the seat cushion.

[109] 79 FR 46109.

[110] There are significant differences in the way a manufacturer demonstrates compliance with safety regulations in European Union and in the United States. In Europe, European governments use ''type approval,'' which means that they approve particular designs as complying with their safety standards. In the U.S., NHTSA issues performance standards, to which manufacturers self-certify that their vehicles or equipment comply. NHTSA does not pre-approve vehicles or equipment before sale. Under the Vehicle Safety Act, the FMVSSs must be objective, repeatable, and meet certain other statutory criteria. NHTSA enforces the FMVSSs by obtaining new vehicles and equipment for sale and testing them to the requirements in the FMVSSs according to the procedures specified in the standards.

[111] Further information regarding the alternative certification methods of ECE R.66 is available at: Motorcoach Roof Crush/Rollover Testing Discussion Paper, March 2009, Docket No. NHTSA–2007–28793–0019.

simulation would be feasible if NHTSA ''defines the performance requirements, assumptions, calculations and validation method in the regulation, [and] all manufacturers make the same assumptions and perform the test with same simulation and analysis methods.'' Prevost believed that ECE R.66 alternatives may be used to prove certification of designs that are ''evolutions of what already exists.'' EvoBus believed not allowing numerical simulation imposes a burden because ''it would be necessary to provide a vehicle with exactly the same specifications as the one which gave raise to questions.''

Agency Response

This final rule adopts the complete vehicle test of ECE R.66 into FMVSS No. 227. By doing so, NHTSA is specifying the test procedure NHTSA will use to assess a vehicle's compliance with FMVSS No. 227. The standard will not provide for NHTSA's use of Alternatives 1 through 4 to determine compliance. However, this does not mean that manufacturers must use the complete vehicle test to certify their vehicles. To the contrary, the Safety Act requires manufacturers to ensure their vehicle meet all applicable FMVSSs, and that they certify the compliance of their vehicle with applicable FMVSS. The Safety Act specifies that manufacturers may not certify if in exercising reasonable care the manufacturer has reason to know the certificate is false or misleading. This means a manufacturer may use the alternative compliance methods of ECE R.66 to certify its vehicles if it can do so in exercising reasonable care. While manufacturers must ensure that their vehicles will meet the requirements of FMVSS No. 227 when NHTSA tests the vehicles in accordance with the test procedures specified in the standard, they do not have to conduct the test described in FMVSS No. 227 to certify that compliance.

NHTSA considered ECE R.66's alternative compliance methods but determined that they would not be practical for the agency's compliance program. (See explanation in the NPRM, 79 FR 46111–46112.) The agency has considered the comments but has not changed its mind.

Alternatives 1 and 2 involve testing body sections. To obtain a body section, NHTSA could procure it from the manufacturer, but that raises questions about how representative the sample would be of buses in actual production. Some manufacturers might make a more conscientious effort to produce the specimen, and so the specimen might not be representative of a typical mass-produced bus. NHTSA could section a bus itself, but that would be impractical and a waste of resources.

Alternatives 1 and 2 require that the body-sections be representative of the entire vehicle. Determining the representativeness of a body-section would require input and analysis from the manufacturer, and even with that, determining what is ''representative'' could be subjective and difficult for NHTSA to verify. (*E.g.,* is the center of gravity of the body section representative of the whole vehicle?) Importantly, it might make more sense if the representative sample were representative of the worst-case (weakest) section, to make sure all body sections of the bus are capable of passing the test. The alternatives do not make it clear that NHTSA could test the weakest section, and thus do not make clear that the entire vehicle would have to meet the standard.

Testing an entire vehicle rather than body sections is preferable to NHTSA because it better ensures all body sections will be able to conform to FMVSS No. 227, including representative as well as worse-case (weakest) sections of the bus. Testing an entire bus to the complete vehicle test is the most objective, scientific way to assure the entire bus structure is satisfactory and the glazing panels are retained.

Regarding Alternatives 3 and 4, under the Safety Act, NHTSA is directed to issue performance standards,[112] the compliance with which must be measured objectively.[113] A concern with assessing compliance using calculations, extrapolations, and computer simulations is that entities may differ in opinion as to whether a manufacturer's calculations and computer simulations were appropriate or correctly made for demonstrating compliance in a particular instance. A manufacturer may have the knowledge of the materials and joint structure for their vehicles to be able to accurately model them, while an external entity may not be able to easily reproduce those results.

The variability of assumptions in such models makes this method less preferable for use by NHTSA in evaluating compliance with an FMVSS. For example, for Alternative 3, we would need to identify the location of the plastic zones and plastic hinges as well as estimate their load-deformation curves. For Alternative 4, mathematical models that simulate accurately the actual rollover crash of the vehicle are required.

Further, there is a concern that basing compliance on calculations and computer simulations may not account for differences that may occur between the analytical model and the vehicle *as manufactured.* Because an actual vehicle is not involved in the assessment of compliance using Alternatives 3 and 4, these alternatives might not account for variation or flaws in material properties, or quality control deficiencies in the manufacturing build processes. A design that looks acceptable ''on paper'' or in theory might not turn out so as assessed by testing an actual vehicle. To the extent possible, NHTSA prefers to test actually-manufactured vehicles, to assess not only the design of the vehicle, but the real-world production of the vehicle.

In short, deficiencies in vehicle performance due to poor quality control of manufacturing processes, sub-standard quality of supplied materials or errors in the engineering analysis underlying the vehicle design can be better discovered when an actual vehicle is tested than under a compliance system using Alternatives 3 and 4.

For these reasons, this final rule is based on the complete vehicle test of ECE R.66 to determine compliance. NHTSA is incorporating ECE R.66's compliance framework in a manner that meets the requirements of MAP–21 and the requirements and considerations of NHTSA's Safety Act. The agency emphasizes that FMVSS No. 227 does not preclude manufacturers from using the alternative compliance methods of ECE R.66 to certify their vehicles. As explained in the NPRM,[114] although an engineering analysis model would not be appropriate as the agency's method of assessing the compliance of vehicles with a Federal motor vehicle safety standard manufacturers are not required to use NHTSA's test as the basis for their certification. While the agency's test defined in the proposed regulatory test would be an objective test capable of determining which vehicles meet the minimum requirements, manufacturers can use other methods (such as the alternative compliance options in ECE

[112] In 49 U.S.C. 30102, the Vehicle Safety Act defines ''motor vehicle safety'' as the ''performance'' of motor vehicles or motor vehicle equipment in a way such as to avoid creating an unreasonable risk of accident to the general public. The same Act defines ''motor vehicle safety standards'' as minimum standards for motor vehicle or motor vehicle equipment ''performance.''

[113] In 49 U.S.C. 30111(a), the Vehicle Safety Act requires that Federal motor vehicle safety standards be stated in objective terms.

[114] 79 FR 46117; August 6, 2014.

R.66) in certifying the compliance of their own vehicles.

Manufacturers using ECE R.66's alternatives are responsible for ensuring that the vehicles will meet the requirements of FMVSS No. 227 when tested by NHTSA per the agency's procedures. However, manufacturers certifying compliance of their own vehicles have much more detailed information regarding their own vehicles and production methods than NHTSA and should be capable of using other methods to certify their vehicles. If manufacturers are confident that the data obtained by using the test methods described in ECE R.66's Alternatives 1 through 4 assure conformance with the standard just as the complete vehicle test does, nothing precludes them from using those alternatives to certify their vehicles to FMVSS No. 227 with confidence.

b. Regulatory Alternatives

In deciding on the approach adopted by this final rule, NHTSA examined the following alternatives.

1. FMVSS No. 216

NHTSA considered the requirements of FMVSS No. 216, ''Roof crush resistance.'' FMVSS No. 216 applies to vehicles with a GVWR of 4,536 kg (10,000 lb) or less (light vehicles), and specifies a test that applies localized static loads to the upper front corners of a vehicle's roof and windshield area. The large buses covered under this final rule are larger/heavier than light vehicles and are more likely to roll along a longitudinal vehicle axis than yaw and pitch. Thus, in an actual rollover involving one of these vehicles, the entire length of the vehicle is loaded as in the ECE R.66 test. NHTSA believes the ECE R.66 test is more representative of a real-world rollover of a large bus than the FMVSS No. 216 test since the ECE R.66 test imparts loads along the full length of the vehicle.

In addition, the ECE R.66 test is a dynamic test in which ''survival space'' performance requirements are specially designed for the large bus interior. There are also additional safety issues specific to the vehicles covered by this rule (opening of emergency exits, detachment of windows from their mountings) that can be evaluated in the dynamic event. Since two-thirds of rollover fatalities are due to ejections, addressing these additional safety issues is vital to addressing the safety problem in rollovers. Therefore, the agency believes that the ECE R.66 test addresses more of the safety needs of a large bus rollover crash than the FMVSS No. 216 test.

2. FMVSS No. 220

FMVSS No. 220 is a school bus roof crush standard that places a uniformly distributed vertical force pushing directly downward on the top of the bus with a platen that is 914 mm (36 inches) wide and that is 305 mm (12 inches) shorter than the length of the bus roof. The standard specifies that when a uniformly distributed load equal to 1.5 times the unloaded vehicle weight is applied to the roof of the vehicle's body structure through a force application plate, the downward vertical movement at any point on the application plate shall not exceed 130 mm (5.125 inches) and the emergency exits must be operable during and after the test.

The agency included FMVSS No. 220 in its research into rollover structural integrity for large buses and, in the NPRM, tentatively decided the ECE R.66 test was preferable to the FMVSS No. 220 for motorcoaches for several reasons. First, the agency determined that an ECE R.66 based test is more suitable for the vehicles covered by FMVSS No. 227 than an FMVSS No. 220-based test because a significant portion of fatalities in the subject buses result from occupant ejections. Unlike school buses, the subject motorcoach and other large buses operate intercity routes and typically travel at higher speeds than school buses transporting children to a local educational facility. Further, many of the motorcoaches and subject intercity buses are designed with a higher center of gravity than school buses and have larger windows. These characteristics can lead to a higher incidence of occupant ejections during rollovers involving the non-school buses. The agency believed dynamic rollover test in ECE R.66 affords the agency the opportunity to better evaluate ejection-related factors such as the emergency exits and side window glazing retention during a rollover crash.

After considering the comments, NHTSA makes the following decisions. As previously discussed, the agency is permitting manufacturers of school bus derivative buses to certify compliance with FMVSS No. 220 as an alternative to certifying to the ECE R.66 test in FMVSS No. 227. FMVSS No. 220 has been proven to adequately ensure roof crush protection in vehicles designed to meet the FMVSSs applying to school buses, so allowing school bus derivative buses to meet FMVSS No. 220 avoids redundancy in the FMVSS. NHTSA is not permitting FMVSS No. 220 as an alternative to FMVSS No. 227 for buses other than school bus derivative buses. The dynamic test in FMVSS No. 227 is a more representative test of real-world rollovers for motorcoaches and buses other than school buses and addresses safety needs arising in rollovers of those vehicles that FMVSS No. 220 does not address.

c. Additional MAP–21 Considerations

In addition to the MAP–21 provisions discussed previously in this document, MAP–21 also directs NHTSA to consider the best available science, potential impacts on seating capacity, and potential impacts on the size/weight of motorcoaches.[115] Further, MAP–21 directs the agency to consider combining the various motorcoach rulemakings contemplated by MAP–21 and to avoid duplicative benefits, costs, and countermeasures.[116]

NHTSA considered the best available science in developing this final rule. The agency developed this rule based on FMVSS No. 220 and ECE R.66 test studies NHTSA conducted on large bus rollover structural integrity (*see* section IV of the NPRM), and after considering advanced glazing countermeasures (*see* May 6, 2016 (81 FR 27904) NPRM, *supra,* and ''Motor Coach Glazing Retention Test Development For Occupant Impact During A Rollover,'' Martec Technical Report # TR–06–16, Rev 4, August 2006 [117]). NHTSA considered FMVSS No. 216 and ECE R.66 alternative compliance methods (*see* sections VI of the NPRM).

Coach USA provided the only response to the NPRM request for comment on the impact of added vehicle weight to seating capacity. It requested NHTSA to consider that further increases to motorcoach weight could make it difficult for all operators to carry a full passenger load while still complying with applicable vehicle and axle weight limits. NHTSA does not believe this final rule will adversely impact seating capacity. Large bus buyers expect maximum seating capacity with adequate luggage capacity for a given floor space or vehicle length. Estimates for structural weight added to a bus to meet this final rule are based on usage of steel.[118] NHTSA is aware that other methods of reinforcing the structure (such as the use of high strength steel sections, rigid polyurethane foam filling to reinforce and stabilize thin walled hollow sections, and optimized designs that

[115] *See* MAP–21 section 32703(e)(1).

[116] *See id.* at section 32706(b)–(c).

[117] Docket No. NHTSA–2002–11876–0015.

[118] Final Regulatory Evaluation Large Bus Structural Integrity FMVSS No. 227; NHTSA Office of Regulatory Analysis and Evaluation, National Center for Statistics and Analysis. Available in the docket for this rule.

redistribute the impact loads and enhance the energy absorption capability) may enable a large bus to withstand greater crash forces without increasing as much weight.[119]

Through this final rule and our accompanying Final Regulatory Evaluation (FRE), the agency has considered the potential impacts of this rule on the size and weight of motorcoaches and other large buses affected by this rule.[120] As described further in the next section (and in the FRE), we have considered potential weight increases to motorcoaches as a cost of this final rule due to increased fuel consumption. In the accompanying FRE, we have quantified and accounted for this increased fuel consumption cost in our cost-benefit analysis of the rule. After considering all costs, including the potential weight increase, the agency concludes that the requirements in this final rule will be cost-beneficial.

NHTSA has designed this rule to complement the agency's 2013 final rule on FMVSS No. 208 requiring seat belts for passenger seating positions. The seat belt rule will result in increasing numbers of passengers buckling up on large buses. As they do so, more and more will be retained within the passenger compartment in crashes. NHTSA has designed it so that FMVSS No. 227 and FMVSS No. 208 work together to provide a survival space to the passengers retained within the passenger compartment due to the seat belts. NHTSA has also designed this final rule bearing in mind NHTSA's May 6, 2016 NPRM,[121] issued pursuant to section 32703(b)(2) of MAP–21, that proposes to adopt an advanced glazing standard for large buses (OTRBs and non-OTRBs with a GVWR greater than 11,793 kilograms (26,000 pounds)). The reinforcements to the superstructure and bus body to meet FMVSS No. 227's structural integrity requirements will increase the likelihood that anti-ejection advanced glazing installed consistent with section 32703(b)(2) will be retained in a rollover crash.

Finally, NHTSA is avoiding duplicating benefits, costs, and countermeasures in the motorcoach rulemakings of MAP–21. As described above, the agency believes that the requirements of FMVSS No. 227 work together with the passenger seat belt requirements of FMVSS No. 208 and complements an advanced glazing standard. As described in the accompanying FRE, the agency has estimated the benefits and costs of this final rule while considering the effect of seat belts on the subject buses and the application of the ESC rule.

XIV. Lead Time

The agency proposed a compliance date of 3 years after publication of the final rule for FMVSS No. 227. MAP–21 (in section 32703(e)) directs that the rulemaking shall apply to all motorcoaches manufactured more than 3 years after the date on which the regulation is published as a final rule.

Comments Received

IC Bus agreed with the proposed 3-year lead time. Van Hool stated ''that for the requirements for the strength of superstructure according to the Series of Amendment 01 of UN Regulation No. 66 . . . a transition period of 144 months was granted.''

Agency Response

This final rule adopts the 3-year compliance date. To enable manufacturers to certify to the new requirements as early as possible, optional early compliance with the standard is permitted. The 3-year date for motorcoaches is required by MAP–21. If Van Hool was requesting a 144-month lead time, NHTSA declines the request as contrary to MAP–21. Further, the commenter provided no information to support or further explain their interest in or need for a 144-month (12-year) lead time for the effective date of FMVSS No. 227. Van Hool and others currently manufacture buses for sale to European countries including Italy, France, Germany, Poland, and the Netherlands.[122] Each of these countries is listed under the 1958 Agreement as countries granting approval to buses meeting the requirements of ECE R.66. Since Van Hool already designs buses for ECE R.66 requirements, NHTSA believes that the commenter has a good foundation for manufacturing buses that meet the structural requirements of FMVSS No. 227.

NHTSA concludes that three years of lead time will be sufficient for bus manufacturers generally to make the necessary changes. The lead time for motorcoaches is mandated by MAP–21, but it is also reasonable. Van Hool and other manufacturers of buses that already meet ECE R.66 may have to improve the type of latches used on emergency exits, and improve the mounting of side windows, but three years will be ample time to complete the design, testing, and changes in production necessary to certify compliance to the FMVSS No. 227 requirements.

For manufacturers whose buses do not already meet ECE R.66, NHTSA believes that manufacturers will need to make structural design changes to their large bus models either by changing the strength of the sidewall and glazing frame material or the material's physical dimensions (*i.e.*, thickness or width). Per the results of our test program conducted in support of this rulemaking, newer buses may need stronger side pillars to meet the glazing retention requirements, and redesigned mechanisms on roof exits and side window exits to ensure that they do not release during the impact. We believe that these changes can be done within three years. Further, we note that under 49 CFR 571.8(b), manufacturers of buses other than motorcoaches built in two or more stages and alterers are provided an additional year of lead time for manufacturer certification and compliance.

XV. Retrofitting Used Buses

The agency stated in the NPRM that, based on the agency's tests of older buses, major structural changes to the vehicle's entire sidewall and roof structure would be needed for some existing buses to meet the proposed rollover structural integrity requirements. NHTSA believed that the structural changes are likely to be cost-prohibitive, making retrofitting for rollover structural integrity impractical. NHTSA requested comments on the feasibility, benefits, and costs of any potential requirement to retrofit existing buses to meet FMVSS No. 227.

Comments Received

Almost half of the respondents to the NPRM commented on the retrofit issue and all opposed retrofitting. IC Bus, Daimler Trucks, Van Hool, ABA, Greyhound, Coach USA, Prevost, and Advocates raised concerns about retrofit. They believed that the work involved in retrofitting a bus to meet FVMSS No. 227, even just the glazing aspects of the standard, would entail impracticable and unreasonable reworking of the bus structure. The complications of retrofit are exacerbated, they stated, by having to deal with the condition of existing

[119] *See* Lilley, K. and Mani, A., ''Roof-Crush Strength Improvement Using Rigid Polyurethane Foam,'' SAE Technical Paper 960435, 1996. Available at: *https://subscriptions.sae.org/content/960435/, see also* Liang, C. and Le, G. Optimization of bus rollover strength by consideration of the energy absorption ability. International Journal of Automotive Technology. Vol. 11.(2) 173–185. Available at: *https://www.springerlink.com/content/tk824863k66w0228/export-citation/*.

[120] ''Motorcoach'' in this paragraph has the meaning given in MAP–21 (OTRBs).

[121] 81 FR 27904, *supra*.

[122] Information from review of Van Hool website press release information. Obtained February 24, 2017 (*https://www.vanhool.be/ENG/bedrijsfinfo/historiek/historiek2009-20.html*).

structures, the lack of original design information, and possible need for Federal oversight and approval of each bus's structural rework.

Agency Response

NHTSA is not specifying a retrofit requirement. The agency did not receive or discover any new information that would alter the previous determination that retrofitting of existing buses would be impracticable and unreasonable. The agency continues to expect the structural changes needed for retrofitting to be substantial, and to involve significant costs beyond those estimated in our regulatory analysis for new buses. The cost impacts would likely have a substantial adverse impact on a significant number of small entities (*e.g.* , owner-operators of buses used for transport), without a commensurate safety benefit. Therefore, NHTSA reaffirms the earlier decision not to require retrofit of used buses to meet FMVSS No. 227.

XVI. Overview of Costs and Benefits

Based on the FARS data over the 15-year period between 2004 and 2018, there were a total of 56 fatal rollover crashes involving the bus types covered by this final rule, resulting in 189 occupant fatalities. Beyond the benefits attributable to the rules on seat belts and ESC for these vehicles, NHTSA estimates this final rule will save approximately 3 lives annually (undiscounted) if 15 percent of occupants use seat belts, and approximately 2 lives annually (undiscounted) if 90 percent of occupants use seat belts.[123] NHTSA estimates this final rule will reduce the number of seriously injured occupants by approximately 4 annually. These estimated benefits are distinct from the passenger protections attributable to the seat belt and ESC requirements for buses covered by this final rule and are conservative estimates. As explained later in this section, these estimates do not count possible benefits to belted occupants who were saved from injury or fatality because of the survival space provided by FMVSS No. 227.

While belted occupants will benefit from a survival space, unbelted occupants will benefit as well. The belted occupant will mostly benefit from reduced intrusion of structures and objects into the survival space. The unbelted occupants will benefit from a reduced risk of occupant ejection. Given these differences in how occupants will benefit from the rule, we have estimated benefits for each group separately.

Also, the benefits estimates will vary by seat belt use. Available research regarding seat belt use suggests that it can be highly variable. NHTSA has estimated the lower end of seat belt use at 15 percent and the upper end of seat belt use at 90 percent. The agency assumes that, initially, belt use will be closer to the lower end (15 percent) because passengers are not yet accustomed to seat belts on the buses. Many large buses in use do not have seat belts, and passengers have not been educated about the benefits of buckling up in a large bus.

NHTSA estimates that at 3 percent and 7 percent discount rates, 1.87 to 2.45 equivalent lives are saved annually if 15 percent of occupants use seat belts and 1.46 to 1.92 equivalent lives are saved annually if 90 percent of occupants use seat belts (see Table 13 below).

The agency estimates that, assuming steel is used to strengthen the vehicle structure to comply with the requirements in this final rule, material costs for each vehicle will range from $325 to $591 and cost between $0.71 million and $1.30 million to equip the entire new large bus fleet annually (see Table 14 below). NHTSA further estimates that, if steel is used to comply, the total weight increase will range from 181 to 356 kg (399 to 784 lb) and cost an additional $1,862 to $4,790 in fuel per vehicle over the lifetime of the vehicle. The total fuel cost for the new fleet is estimated to be $4.10 million to $10.54 million. The total costs will be approximately $4.81 million to $11.84 million annually. The cost per equivalent life saved is estimated to be between $2.48 million and $6.38 million (see Table 15 below) and net economic benefit is estimated to be between $8.25 million and $23.31 million in 2020 dollars.

The available information shows this final rule is cost beneficial. The above estimates for the cost per equivalent life of this rule vary due to uncertainties regarding seat belt use rates and the incremental increase in weight that is necessary to meet FMVSS No. 227. For seat belt use, NHTSA believes that the projected net impact on the economy will be closer to the estimates for the 15 percent belt use rates than the 90 percent belt use rate, as explained above. A large portion of the costs of this structural integrity rule is dependent on this incremental increase in weight. NHTSA does not have more specific information regarding the likely weight increase to these vehicles.

The agency believes that the cost effectiveness of this rule is not very sensitive to changes in belt usage rates because belted passengers will still realize safety benefits because of this rule. Many serious injuries that occur in large bus crashes can occur despite a passenger's use of a safety belt. For example, while belted passengers may not be ejected, they can still be struck by the collapsing side wall of the bus. Therefore, even though increasing seat belt usage rates may mean that more passenger ejections (and fatalities) will be prevented by seat belts (consequently reducing the number of prevented ejections attributable to FMVSS No. 227), the final rule will still be effective in preventing serious injuries to belted passengers. Thus, we expect that the monetized value of the benefits of this rule is not very sensitive to fluctuations in seat belt use—even though the type of benefit will change.[124]

TABLE 13—ESTIMATED ANNUAL BENEFITS

[Equivalent lives saved]

	15% belt use	90% belt use
3% Discount	2.45	1.92
7% Discount	1.87	1.46

[123] The FRE prepared in support of this final rule assumes that the seat belt use rate on large buses will be between 15 percent and the percent use in passenger vehicles, which was 90 percent in 2009. To maintain consistency with the seat belt rule, we have used the same low belt usage rate estimate of 15 percent from that rule, and the same source of information to establish the high belt usage rate estimate (See 2009 National Occupant Protection Use Survey. More information at: *https://www-nrd.nhtsa.dot.gov/pubs/811100.pdf*).

[124] For further information, see the FRE prepared in support of this final rule. The FRE discusses issues relating to the potential costs, benefits and other impacts of this regulatory action. The FRE is available in the docket for this final rule and may be obtained by downloading it or by contacting Docket Management at the address or telephone number provided at the beginning of this document.

TABLE 14—ESTIMATED ANNUAL COSTS

[2020 Dollars]

Potential Costs:	
Material Costs Per Vehicle	$325 to $591.
Material Costs, Total New Fleet	$0.71 million to $1.30 million.
Fuel Costs per Vehicle @ 3%	$2,441 to $4,790.
Fuel Costs per Vehicle @ 7%	$1,862 to $3,654.
Fuel Costs, Total New Fleet	$4.10 million to $10.54 million.
Total Annual Cost	$4.81 million to $11.84 million.

TABLE 15—COST PER EQUIVALENT LIFE SAVED IN MILLIONS (M) OF 2020 DOLLARS

	15% belt use 3% discount	15% belt use 7% discount	90% belt use 3% discount	90% belt use 7% discount
Cost (New Vehicle + Fuel)	6.08–11.84	4.81–9.34	6.08–11.84	4.81–9.34
Equivalent Lives Saved	2.45	1.87	1.92	1.46
Cost per Equivalent Life Saved	2.48–4.83	2.57–4.99	3.17–6.17	3.28–6.38

The cost of reinforcing the roof strength and structural integrity of these vehicles to meet the requirements in this final rule are predominantly dependent upon the material and weight increases necessary to reinforce the superstructure. NHTSA estimates that the countermeasures may include stronger roof and side walls, shock resistant latches for emergency exits, and improved window mounting. As mentioned above, these material costs for each vehicle are estimated to be between $325 and $591. However, while the agency assumes in these estimates that steel is applied to reinforce the vehicle structure, the agency is aware that other methods of reinforcing the structure (such as the use of high strength steel sections, rigid polyurethane foam filling to reinforce and stabilize thin-walled, hollow sections, and optimized designs that redistribute the impact loads and enhance the energy absorption capability) may enable a vehicle to withstand greater crash forces without adding as much weight.[125] Therefore, while our analysis has assumed the use of steel, the agency is aware that there may be other countermeasures that weigh less—which could result in lower fuel costs—than we have currently estimated, over the lifetime of the vehicle.

The agency also notes that, in addition to the quantifiable benefits mentioned above, there are other benefits arising from this final rule. Our economic analysis of this rule is only able to calculate the benefits that can be realized above and beyond the benefits attributable to previously-published final rules, in particular, the November 25, 2013 (78 FR 70416) seat belt final rule. In other words, we are only able to estimate the benefits to passengers whose serious and fatal injuries were not prevented by seat belts. When an occupant who would have been seriously or fatally injured in a bus crash is estimated as saved from such injury by a countermeasure previously made effective for that occupant (*e.g.*, a seat belt), NHTSA no longer estimates additional benefits for that particular passenger.

However, we believe that some people who were saved by the seat belt could still benefit from this rule, as the poor structural integrity of a bus could contribute toward a fatality or an injury for this saved occupant. It is important to note that while the agency could estimate benefits to belted passengers who still were seriously injured or killed notwithstanding the seat belts, because of our practices we do not estimate what additional benefits could be realized by passengers who were already considered saved from serious and fatal injury due to the seat belts. As the agency is unaware of any available information that would enable the agency to quantify this latter benefit, the agency's economic analysis of this rule only estimates the benefits to occupants who were not saved by the seat belts.[126] [127]

XVII. Rulemaking Analyses and Notices

Executive Order (E.O.) 12866, E.O. 13563, and DOT Rulemaking Procedures

NHTSA has considered the impact of this final rule under Executive Orders 12866 and 13563, and DOT administrative rulemaking orders and procedures. This final rule is not considered significant and was not reviewed by the Office of Management and Budget under E.O. 12866.

This final rule increases roof strength and structural integrity for certain large bus types by establishing requirements for maintaining survival space and emergency exit operability during and after a rollover structural integrity test. This final rule specifies a test procedure that tilts the vehicle on a platform until the vehicle becomes unstable and rolls over onto a level concrete impact surface.

[125] *See* Lilley, K. and Mani, A., ''Roof-Crush Strength Improvement Using Rigid Polyurethane Foam,'' SAE Technical Paper 960435, 1996. Available at: *https://subscriptions.sae.org/content/960435/*, *see also* Liang, C. and Le, G. Optimization of bus rollover strength by consideration of the energy absorption ability. International Journal of Automotive Technology. Vol. 11.(2) 173–185. Available at: *https://www.springerlink.com/content/tk824863k66w0228/export-citation/*.

[126] Thus, we believe our estimate of benefits is conservative, undercounting possible benefits to occupant who were saved from fatal ejection by seat belts but still seriously injured by collapsing structure or unrestrained heavy vehicle components intruding into the survival space.

[127] This final rule will also theoretically result in additional benefits by functioning to support NHTSA's proposed rule on FMVSS No. 217a, *supra*, to mitigate ejection risks through installation of advanced glazing. This final rule will provide for the structural foundation, or anchor, to retain advanced glazing to the vehicle when that advanced glazing is installed per the proposed FMVSS No. 217a. While this final rule on FMVSS No. 227 could result in associated benefits regarding FMVSS No. 217a, we have not quantified them for this rulemaking proceeding.

NHTSA has prepared a FRE for this final rule.[128] Beyond the benefits attributable to rules on seat belts for this same group of vehicles and ESC, NHTSA estimates that this final rule will save approximately 3.12 equivalent lives annually if seat belt usage among occupants is 15 percent, and approximately 2.45 equivalent lives annually if seat belt usage is 90 percent. The total cost of making the necessary structural changes, and of lifetime fuel costs, will be approximately $4.81 million to $11.84 million annually (for the entire new fleet). The net cost per equivalent life saved is estimated to be between $2.48 million and $6.38 million. The benefits, costs, and other impacts of this rulemaking are discussed at length in the FRE.

Executive Order 13609: Promoting International Regulatory Cooperation

The policy statement in section 1 of Executive Order 13609 provides, in part: The regulatory approaches taken by foreign governments may differ from those taken by U.S. regulatory agencies to address similar issues. In some cases, the differences between the regulatory approaches of U.S. agencies and those of their foreign counterparts might not be necessary and might impair the ability of American businesses to export and compete internationally. In meeting shared challenges involving health, safety, labor, security, environmental, and other issues, international regulatory cooperation can identify approaches that are at least as protective as those that are or would be adopted in the absence of such cooperation. International regulatory cooperation can also reduce, eliminate, or prevent unnecessary differences in regulatory requirements.

As mentioned in this preamble, the agency has considered regulatory approaches taken by foreign governments (namely, the European Union in ECE R.66) and decided to base FMVSS No. 227 on ECE R.66. In addition to the goal of reducing unnecessary differences in regulatory requirements between the U.S. and its trading partners, the agency has found the ECE R.66 test to be the most suitable test available for ensuring a minimum reasonable level of protection for passengers traveling in buses that are associated with the highest crash risk. While NHTSA has determined that it is not able to adopt the entirety of ECE R.66 and has adopted emergency exits latching requirements which are not in ECR R.66, the agency has explained its rationale for its decisions in the relevant sections of this document.

Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small governmental jurisdictions). The Small Business Administration's regulations at 13 CFR part 121 define a small business, in part, as a business entity ''which operates primarily within the United States.'' (13 CFR 121.105(a)). No regulatory flexibility analysis is required if the head of an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

NHTSA has considered the effects of this rulemaking action under the Regulatory Flexibility Act. Per 13 CFR 121.201, the Small Business Administration's size standards regulations used to define small business concerns, manufacturers of the vehicles covered by this rule fall under North American Industry Classification System (NAICS) No. 336111, *Automobile Manufacturing*, which has a size standard of 1,000 employees or fewer. NHTSA estimates that there are 26 manufacturers of these types of vehicles in the United States (including manufacturers of motorcoaches, cutaway buses, second-stage motorcoaches, and other types of large buses covered by this rule). Using the size standard of 1,000 employees or fewer, we estimate that approximately 10 of these 26 manufacturers are considered small businesses.

I certify that this final rule will not have a significant economic impact on small entities. First, the agency estimates that the incremental costs to each vehicle would be $325 to $591 per unit to meet the rule. This incremental cost would not constitute a significant impact given that the average cost of the vehicles covered by this rule ranges from $200,000 to $400,000. Further, these incremental costs, which are very small compared to the overall cost of the vehicle, can ultimately be passed on to the purchaser and user.

In addition, the agency believes that certifying compliance with the rule will not have a significant impact on the small manufacturers. These entities have various options available that they may use to certify compliance with the standard.

This final rule adopts ECE R.66's compliance framework in a manner that meets the requirements of MAP–21 and the requirements and considerations of NHTSA's Safety Act. The standard will not provide for NHTSA's use of Alternatives 1 through 4 to determine compliance. However, this does not mean that manufacturers must use the complete vehicle test to certify their vehicles. To the contrary, the Safety Act requires manufacturers to ensure their vehicle meet all applicable FMVSSs, and that they certify the compliance of their vehicle with applicable FMVSS. The Safety Act specifies that manufacturers may not certify if in exercising reasonable care the manufacturer has reason to know the certificate is false or misleading. This means a manufacturer may use the alternative compliance methods of ECE R.66 to certify its vehicles if it can do so in exercising reasonable care. While manufacturers must ensure that their vehicles will meet the requirements of FMVSS No. 227 when NHTSA tests the vehicles in accordance with the test procedures specified in the standard, they do not have to conduct the test described in FMVSS No. 227 to certify that compliance.[129]

One option is to certify compliance using modeling or engineering analyses (such as a plastic hinge analysis of portal frames of the vehicle). ECE R.66 itself accounts for and accommodates this compliance option, and this approach has been used for years by European manufacturers in meeting ECE R.66. An engineering analysis model is less preferable to the dynamic test procedure specified in this rule as the agency's method of assessing the

[128] Final Regulatory Evaluation Large Bus Structural Integrity FMVSS No. 227; NHTSA Office of Regulatory Analysis and Evaluation, National Center for Statistics and Analysis. Available in the docket for this rule.

[129] Under the Vehicle Safety Act, a manufacturer can avoid civil penalties associated with a noncompliance if it showed that it exercised due care in certifying its vehicles. A showing of due care can be based on engineering analyses, computer simulations, and the like, and NHTSA will assess the due care upon which the certification is made by evaluating, among other factors, the size of the manufacturer and its resources. Even small manufacturers, however, are responsible for having a reasonable idea as to whether their vehicles comply with the standard. They are responsible for proclaiming that their vehicles will comply should NHTSA test their vehicle. The alternatives discussed in this section provide those bases for certification.

compliance of vehicles with an FMVSS, since the agency may not know enough about the assumptions to use in the model or whether the model in fact represents the subject vehicle as manufactured. However, unlike NHTSA, manufacturers have access to much more information regarding their own vehicles and can analyze information of sufficient detail and breadth about vehicle design, material characteristics and production processes to form a basis for their certification. They can use their own methods for certifying compliance of their vehicles, such as engineering analyses to certify their vehicles. If the basis for their certification is made using reasonable care, they will have met the requirement of section 30115 to certify the compliance of their vehicles. If they used reasonable care in certifying and manufacturing the vehicles, the likelihood that the vehicles will pass the FMVSS No. 227 compliance test when tested by NHTSA according to the standard is very high.

The manufacturer could test body sections of the vehicle, as contemplated by ECE R.66, Alternatives 1 and 2. The manufacturer could ''section'' the vehicle or otherwise obtain a body section representative of the vehicle and of the weakest section of the vehicle. It could base its certification on these tests, without testing a full vehicle. As discussed above, they know their vehicles best, and can test the section most at risk of not meeting FMVSS No. 227 to make sure the vehicle would meet the standard when tested by NHTSA in the complete vehicle test. This process will allow small manufacturers to test parts of the vehicle for compliance, and use their engineering expertise to calculate that the bus will meet the standard when NHTSA tests it in accordance with the procedure specified in FMVSS No. 227.

In the event small manufacturers elect to conduct a test of a full vehicle, there are various methods available to reduce the costs of the test. One such method is by testing a vehicle which is not completely new. As the requirements in this final rule pertain to structural integrity, we believe that a manufacturer could test the relevant body design on an old bus chassis or other underlying structure, and could sufficiently assess and certify the compliance of the vehicle's structural integrity to FMVSS No. 227. Similarly, the agency believes that more costly parts of the vehicle (such as the engine and other portions of the powertrain) could be replaced in a complete vehicle test of a bus with ballast equal to the weight of the absent components. The small manufacturer could base its certification on such testing, which do not involve a destructive test of an actual vehicle.

NHTSA notes that the product cycle of large buses subject to FMVSS No. 227 is much longer than other vehicle types. With a longer product cycle, the agency believes that the costs of certification for manufacturers would be further reduced as the costs of conducting compliance testing and the relevant analyses could be spread over a significantly longer period.

This rule may affect operators of the buses—some of which may be small businesses—but only indirectly as purchasers of these vehicles. As mentioned above, NHTSA anticipates that the impact on these businesses will not be significant because (assuming that additional steel is used for compliance) the expected price increase of the vehicles used by these businesses is small ($325 to $591 for each vehicle (vehicles valued between $200,000 and $400,000)). NHTSA anticipates that fuel costs for these businesses will increase between $1,862 and $4,790 (in 2020 dollars) per vehicle over its lifetime. These expected increases in costs are small in comparison to the cost of each of these vehicles. Given that these costs will equally affect all operators, the small operators will be able to pass these costs onto their consumers. This final rule does not require retrofitting of vehicles on the road.

Executive Order 13132 (Federalism)

NHTSA has examined this final rule pursuant to Executive Order 13132 (64 FR 43255; Aug. 10, 1999) and has determined that no additional consultation with States, local governments, or their representatives is mandated beyond the rulemaking process. The agency has concluded that the rule does not have sufficient federalism implications to warrant consultation with State and local officials or the preparation of a federalism summary impact statement. The rule does not have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

NHTSA rules can have preemptive effect in two ways. First, the National Traffic and Motor Vehicle Safety Act contains an express preemption provision that when a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under the chapter. 49 U.S.C. 30103(b)(1). It is this statutory command by Congress that preempts any non-identical State legislative and administrative law address the same aspect of performance.

The express preemption provision described above is subject to a savings clause under which ''[c]ompliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.'' 49 U.S.C. 30103(e). Pursuant to this provision, State common law tort causes of action against motor vehicle manufacturers that might otherwise be preempted by the express preemption provision are generally preserved. However, the Supreme Court has recognized the possibility, in some instances, of implied preemption of State common law tort causes of action by virtue of NHTSA's rules—even if not expressly preempted.

This second way that NHTSA rules can preempt is dependent upon the existence of an actual conflict between an FMVSS and the higher standard that would effectively be imposed on motor vehicle manufacturers if someone obtained a State common law tort judgment against the manufacturer—notwithstanding the manufacturer's compliance with the NHTSA standard. Because most NHTSA standards established by an FMVSS are minimum standards, a State common law tort cause of action that seeks to impose a higher standard on motor vehicle manufacturers will generally not be preempted. However, if and when such a conflict does exist—for example, when the standard at issue is both a minimum and a maximum standard—the State common law tort cause of action is impliedly preempted. See *Geier* v. *American Honda Motor Co.,* 529 U.S. 861 (2000).

Pursuant to Executive Order 13132, NHTSA has considered whether this rule could or should preempt State common law causes of action. The agency's ability to announce its conclusion regarding the preemptive effect of one of its rules reduces the likelihood that preemption will be an issue in any subsequent tort litigation.

To this end, the agency has examined the nature (*e.g.*, the language and structure of the regulatory text) and objectives of this final rule and does not foresee any potential State requirements that might conflict with it. NHTSA does not intend that this final rule preempt state tort law that would effectively

impose a higher standard on motor vehicle manufacturers than that established by this rule. Establishment of a higher standard by means of State tort law would not conflict with the standard issued by this final rule. Without any conflict, there could not be any implied preemption of a State common law tort cause of action.

National Environmental Policy Act

NHTSA has analyzed this final rule for the purposes of the National Environmental Policy Act. The agency has determined that implementation of this action will not have any significant impact on the quality of the human environment.

Paperwork Reduction Act

Under the procedures established by the Paperwork Reduction Act of 1995, a person is not required to respond to a collection of information by a Federal agency unless the collection displays a valid Office of Management and Budget (OMB) control number. This rulemaking would not establish any new information collection requirements.

National Technology Transfer and Advancement Act

Under the National Technology Transfer and Advancement Act of 1995 (NTTAA) (Pub. L. 104–113), ''all Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities determined by the agencies and departments.'' Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies, such as SAE International. The NTTAA directs this agency to provide Congress, through OMB, explanations when the agency decides not to use available and applicable voluntary consensus standards.

While the agency is not aware of any voluntary standards that exist regarding rollover structural integrity for the large buses covered by this final rule, the agency has examined the applicable European Union standard (ECE R.66). As discussed extensively above, we have adopted an ECE R.66-based test, in part, to avoid requiring manufacturers to meet fundamentally different rollover requirements than those required in the European Union. The areas of this final rule that differ from ECE R.66, and the reasons in support, are extensively discussed in the earlier sections of this preamble.

Executive Order 12988

With respect to the review of the promulgation of a new regulation, section 3(b) of Executive Order 12988, ''Civil Justice Reform'' (61 FR 4729, February 7, 1996) requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect; (2) clearly specifies the effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct, while promoting simplification and burden reduction; (4) clearly specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. This document is consistent with that requirement.

Pursuant to this order, NHTSA notes as follows. The issue of preemption is discussed above in connection with E.O. 13132. NHTSA notes further that there is no requirement that individuals submit a petition for reconsideration or pursue other administrative proceeding before they may file suit in court.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 requires agencies to prepare a written assessment of the costs, benefits and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local or tribal governments, in the aggregate, or by the private sector, of more than $158 million annually (adjusted for inflation to 2020 dollars with base year of 1995). This final rule will not result in expenditures by State, local or tribal governments, in the aggregate, or by the private sector in excess of $158 million annually.

Plain Language

Executive Order 12866 and E.O. 13563 require each agency to write all rules in plain language. Application of the principles of plain language includes consideration of the following questions:

- Have we organized the material to suit the public's needs?
- Are the requirements in the rule clearly stated?
- Does the rule contain technical language or jargon that isn't clear?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the rule easier to understand?
- Would more (but shorter) sections be better?
- Could we improve clarity by adding tables, lists, or diagrams?
- What else could we do to make the rule easier to understand?

If you have any responses to these questions, please inform us.

Regulation Identifier Number (RIN)

The Department of Transportation assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

List of Subjects in 49 CFR Part 571

Imports, Motor vehicles, Motor vehicle safety.

In consideration of the foregoing, NHTSA amends 49 CFR part 571 as follows:

PART 571—FEDERAL MOTOR VEHICLE SAFETY STANDARDS

■ 1. The authority citation for part 571 continues to read as follows:

Authority: 49 U.S.C. 322, 30111, 30115, 30117, and 30166; delegation of authority at 49 CFR 1.95.

Subpart B—Federal Motor Vehicle Safety Standards

■ 2. Section 571.227 is added to read as follows:

§ 571.227 Standard No. 227; Bus rollover structural integrity.

S1. *Scope.* This standard establishes performance requirements for bus rollover structural integrity.

S2. *Purpose.* The purpose of this standard is to reduce death and injuries resulting from the structural collapse of the bus body structure in rollover crashes and from partial and complete ejections through emergency exits opening in such crashes.

S3. *Application.*

(a) Subject to S3(b), this standard applies to:

(1) Over-the-road buses; and

(2) Buses that are not over-the-road buses, and that have a gross vehicle weight rating (GVWR) greater than 11,793 kilograms (26,000 pounds).

(b) This standard does not apply to:

(1) School buses, school bus derivative buses, transit buses, and prison buses; and

(2) Buses with 7 or fewer designated seating positions rearward of the driver's seating position that are forward-facing or can convert to forward-facing without the use of tools.

S4. *Definitions.*

Occupant compartment means a space within the vehicle interior intended for driver and passenger use, excluding any space occupied by fixed appliances such as bars, kitchenettes, or toilets.

Over-the-road bus means a bus characterized by an elevated passenger deck located over a baggage compartment.

Prison bus means a bus manufactured for the purpose of transporting persons subject to involuntary restraint or confinement and has design features consistent with that purpose.

School bus is defined in § 571.3.

School bus derivative bus means a bus that meets Federal motor vehicle safety standards for school buses regarding emergency exits (§ 571.217), rollover protection (§ 571.220), bus body joint strength (§ 571.221), and fuel system integrity (§ 571.301).

Stop-request system means a vehicle-integrated system for passenger to use to signal to a vehicle operator that they are requesting a stop.

Survival space means all points within a three-dimensional space in the occupant compartment as defined within the following volume:

(1) The front boundary of the survival space is a transverse vertical plane forward of the most forward seat (whether passenger, or driver seat) when the seat back is in the manufacturer's nominal design riding position. This transverse vertical plane is:

(i) For a forward-facing seat, 600 millimeters (mm) in front of the forward most point on the longitudinal centerline of the front surface of the seat back when the seat is in its forward most position;

(ii) For a rearward-facing seat, through the most forward point (relative to the vehicle) on the longitudinal centerline of the seat back when the seat is in its forward most position with respect to the vehicle;

(iii) For a side-facing seat, through the most forward point (relative to the vehicle) on the seat, including the seat back, seat arm rest, and seat cushion.

(2) The rear boundary of the survival space is the inside surface of the rear wall of the occupant compartment of the vehicle.

(3) The outer boundary of the survival space at any transverse cross section between, or at the front and rear boundaries, is defined on each side of the vehicle by the occupant compartment floor and the following three line segments (see Figure 1 of this section, provided for illustration purposes only):

(i) Segment 1 extends vertically from the floor to an end point that is 500 mm above the floor and 150 mm inboard of the side wall.

(ii) Segment 2 starts at the end point of Segment 1. The end point of Segment 2 is 750 mm vertically above and 250 mm horizontally inboard of the end point of Segment 1.

(iii) Segment 3 is a horizontal line that starts at the end point of Segment 2 and ends at the vertical longitudinal center plane of the vehicle.

Transit bus means a bus that is equipped with a stop-request system sold for public transportation provided by, or on behalf of, a State or local government and that is not an over-the-road bus.

S5. *Requirements.* When tested under the conditions in S6 and the test procedures specified in S7, each bus shall meet the requirements in S5.1 and S5.2.

S5.1 *Survival space intrusion.* No part of the vehicle that is outside the survival space shall intrude into the survival space during the movement of the tilting platform or resulting from impact of the vehicle on the impact surface, except as provided below in this paragraph.

(a) Items separated from the vehicle and with a mass less than 15.0 grams that enter the survival space will not be considered for this evaluation of survival space intrusion.

(b) Portions of a bus over which there is not a permanent roof, such as the upper level of an open-top double-decker bus, will not be considered for this evaluation.

S5.2 *Opening of Emergency exits.* Emergency exits shall not open during the movement of the tilting platform or resulting from impact of the vehicle on the impact surface.

S6. *Test conditions.*

S6.1 *Tilting platform.*

S6.1.1 The tilting platform has a top surface that rests horizontally at its initial position and is of sufficient size to fully contact the bottom of the vehicle's tires, as shown in Figure 2 of this section (figure provided for illustration purposes only).

S6.1.2 The top surface of the tilting platform, at its initial position, is 800 ± 20 millimeters (mm) above the impact surface specified in S6.1.6, as shown in Figures 1 and 2 of this section (figures provided for illustration purposes only).

S6.1.3 The axis of rotation of the tilting platform is a maximum of a 100 mm horizontal distance from the edge of the impact surface closest to the platform and a maximum of 100 mm below the horizontal plane at the top surface of the tilting platform as shown in Figure 3 of this section (figure provided for illustration purposes only).

S6.1.4 The tilting platform is equipped with rigid wheel supports on the top surface as illustrated in Figure 3 of this section (figure provided for illustration purposes only). At each vehicle axle, the wheel closest to the platform's axis of rotation is supported. The rigid wheel supports are positioned to make contact with the outboard tire sidewall of the supported wheels with the vehicle positioned as specified in S6.3.1 to prevent sliding of the vehicle during the test. Each rigid wheel support has the following dimensions:

(a) The height above the top surface of the tilting platform is no greater than two-thirds of the vertical height of the adjacent tire's sidewall.

(b) The width is a minimum of 19 mm.

(c) The length is a minimum of 500 mm.

(d) The top inboard edge has a radius of 10 mm.

S6.1.5 While raising the platform, the tilting platform roll angle, measured at the outside of each wheel farthest from the pivot point, does not differ by more than one degree.

S6.1.6 The impact surface is horizontal, uniform, dry, and smooth concrete. The impact surface covers an area that is large enough to ensure that the vehicle does not strike beyond the impact surface edges.

S6.2 *Vehicle preparation.*

S6.2.1 The vehicle's tires are inflated to the manufacturer's recommended tire pressure.

S6.2.2 Test equipment may be attached securely to the bus structure such that the equipment does not break away from the bus structure from the time the tilting platform begins movement to after the vehicle comes to rest on the impact surface.

S6.2.3 Fixed seats may be removed or adjustable seats repositioned for the installation of test equipment in the survival space. Ballast of any weight up to the weight of the removed seat and 68 kg per designated seating position

may be secured to the bus floor. The ballasts are not placed farther forward than the forward most point of the vehicle seat immediately in front of the removed seat, and the ballasts are not placed farther rearward than the rear most point of the vehicle seat immediately behind the removed seat.

S6.2.4 The fuel tank is filled to any level from 90 to 95 percent of capacity. All other vehicle fluids are filled to any level from 90 to 95 percent of capacity. Fluids may be substituted if the weight of the original fluid is maintained.

S6.2.5 *Ballasting.* The vehicle is loaded to any weight up to and including the GVWR. Up to 68 kilograms (150 pounds) of ballast is installed at all designated seating positions that are equipped with occupant restraints. The ballast is placed on the top of each seat cushion and attached securely to the seat frame such that it does not break away from the seat from the time the tilting platform begins movement to after the vehicle comes to rest on the impact surface.

S7 *Rollover structural integrity test procedure.* Each vehicle shall meet the requirements of S5 when prepared as specified in S6.2 and tested in accordance with the procedures set forth in paragraphs (a) through (f) of this S7.

(a) Position the vehicle on the tilting platform as illustrated in the examples of Figures 2 and 3 of this section with its longitudinal centerline parallel to the tilt platform's axis of rotation, the right or left side facing the impact surface at NHTSA's option, and with the outboard tire sidewall at the widest axle within 100 mm of the axis of rotation. (Figures provided for illustration purposes only.)

(b) Apply the vehicle parking brakes.

(c) Attach a rigid wheel support to the tilting platform at each axle of the vehicle so that it contacts the outboard tire sidewall of the wheel closest to the impact surface.

(d) Block the suspension system of the vehicle to be within ±25 mm of the normal riding attitude as loaded in S6.2.5.

(e) Vehicle windows, doors, and emergency exits are fully closed and latched but not locked.

(f) Tilt the vehicle at a rate not to exceed 5 degrees/second until it starts to rollover on its own.

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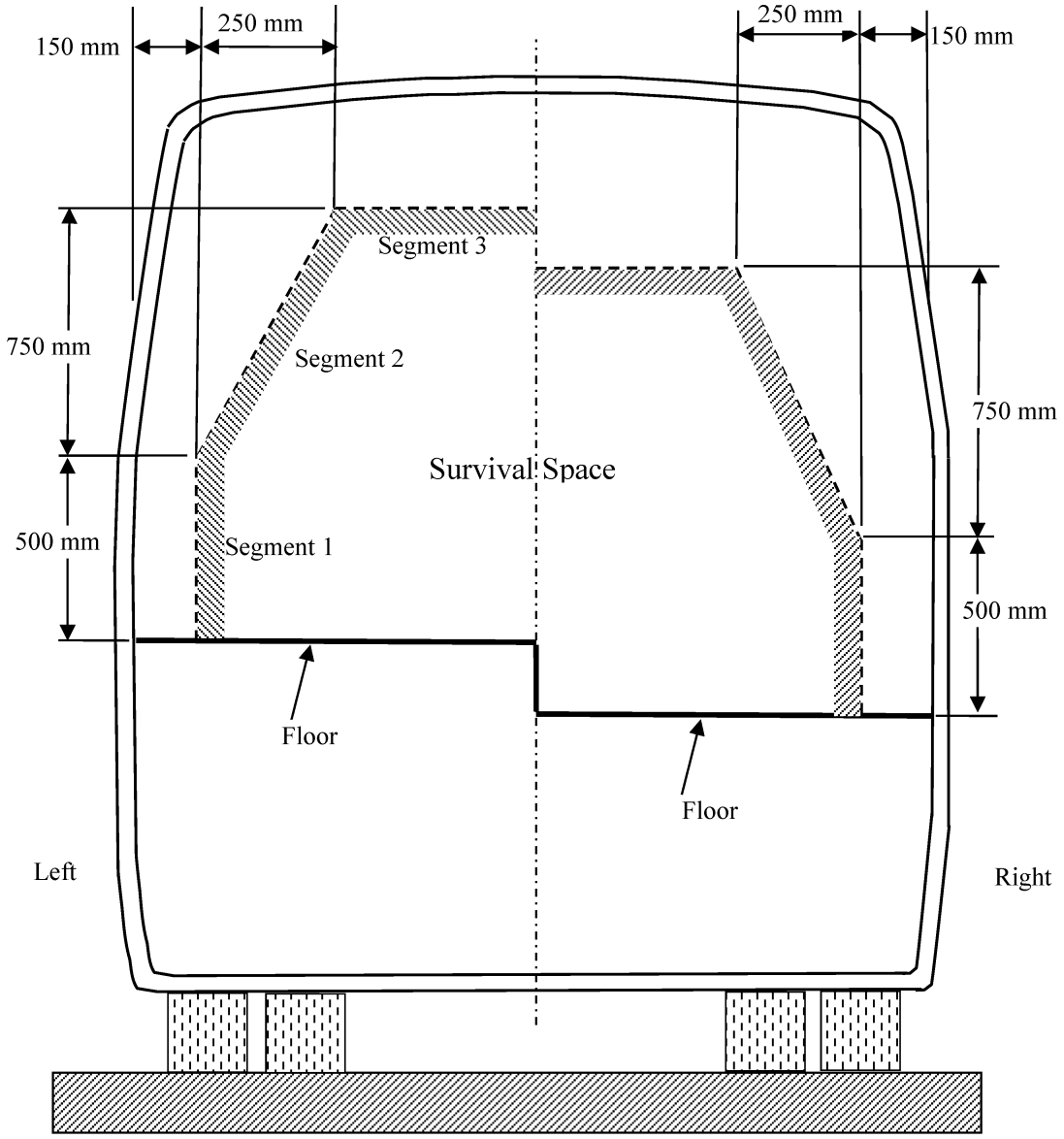

Figure 1 to § 571.227: Survival Space
(Rear View - For Illustration Purposes)

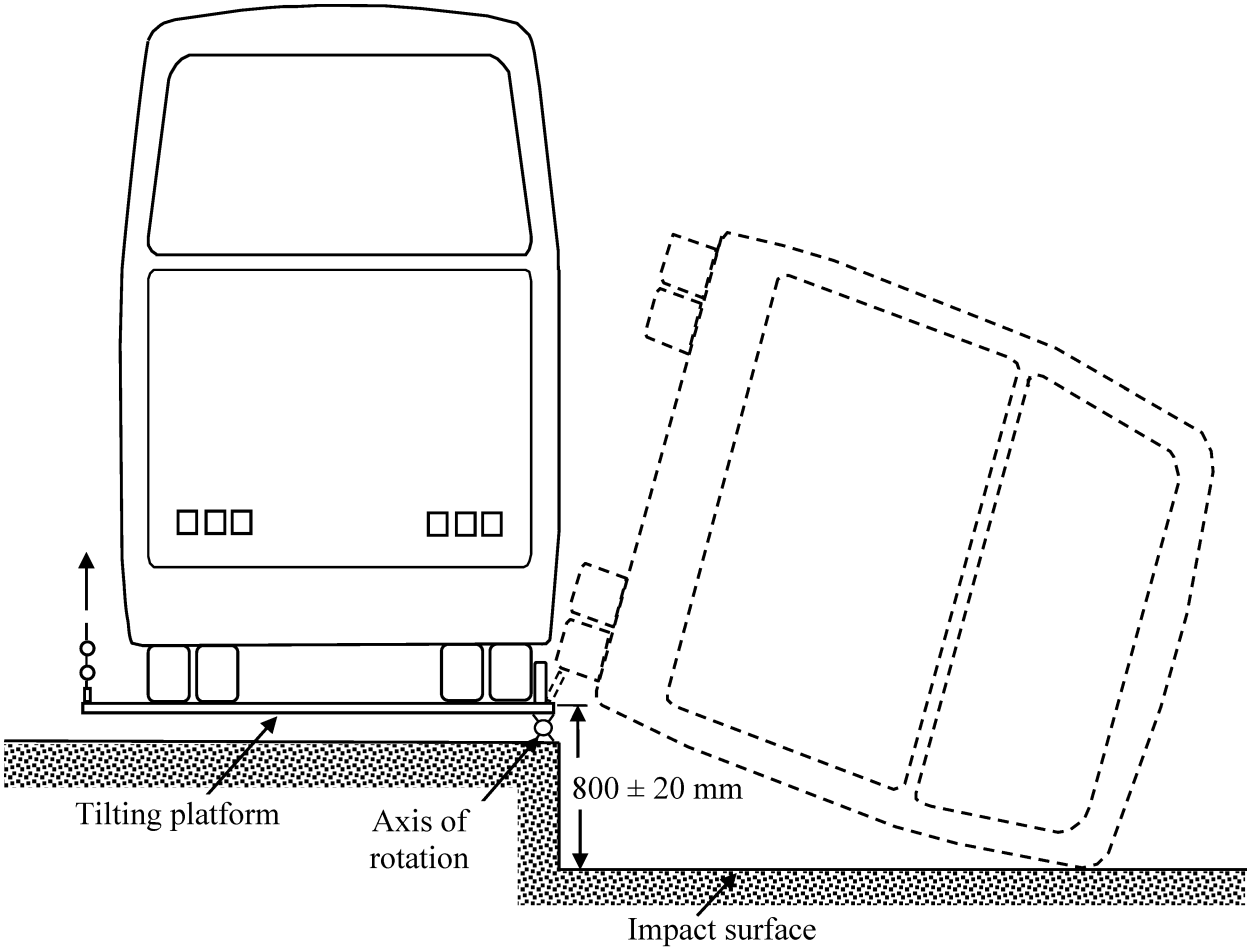

Figure 2 to § 571.227: Vehicle on Tilting Platform (Rear View – For Illustration Purposes)

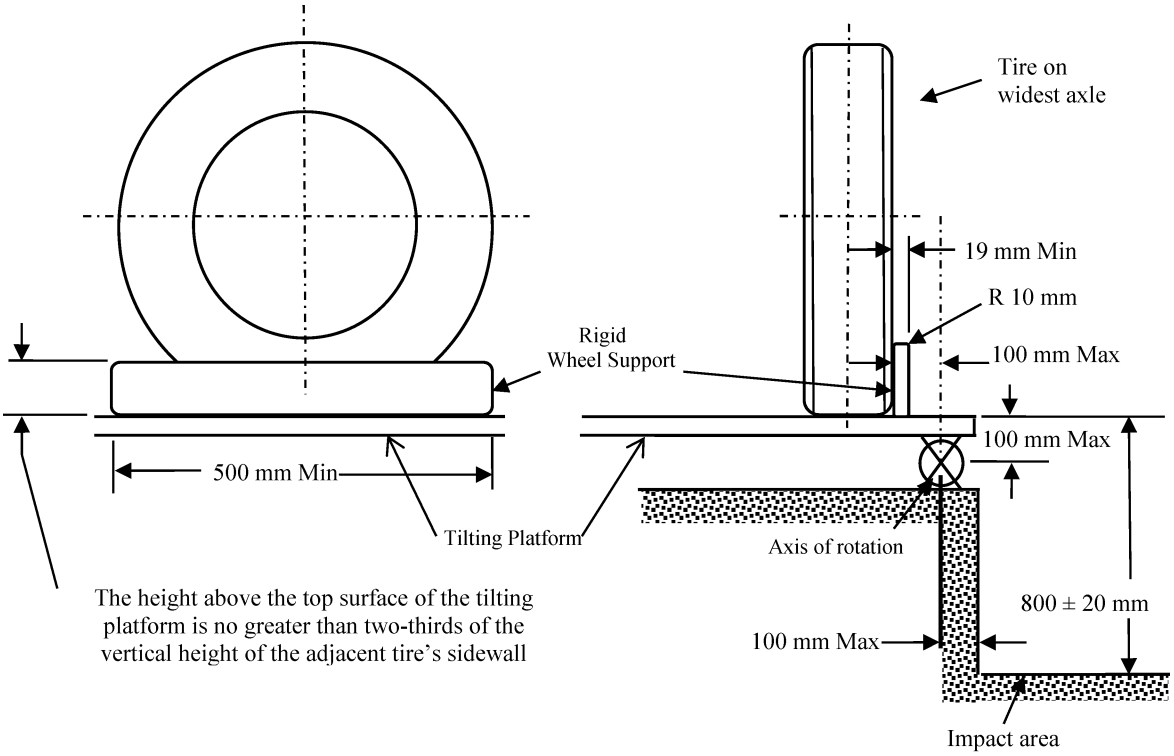

Figure 3 to § 571.227: Axis of Rotation (For Illustration Purposes)

Issued under authority delegated in 49 CFR 1.95.

Steven Cliff,

Deputy Administrator.

[FR Doc. 2021–27538 Filed 12–28–21; 8:45 am]

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FEDERAL REGISTER

Vol. 86 Wednesday,

No. 247 December 29, 2021

Part IV

Environmental Protection Agency

40 CFR Part 52

Clean Air Plans; 2012 Fine Particulate Matter Serious Nonattainment Area Requirements; San Joaquin Valley, California; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2021–0884; FRL–9292–01–R9]

Clean Air Plans; 2012 Fine Particulate Matter Serious Nonattainment Area Requirements; San Joaquin Valley, California

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA or ''Agency'') proposes to approve portions of two state implementation plan (SIP) revisions submitted by the State of California to meet Clean Air Act (CAA or ''Act'') requirements for the 2012 annual fine particulate matter ($PM_{2.5}$) national ambient air quality standards (NAAQS or ''standards'') in the San Joaquin Valley (SJV) Serious nonattainment area. Specifically, the EPA proposes to approve the State's Serious area plan for the 2012 annual $PM_{2.5}$ NAAQS, submitted May 10, 2019, for all Serious $PM_{2.5}$ area requirements (except contingency measures), including emissions inventories, best available control measures, demonstrations of attainment and reasonable further progress, quantitative milestones, and motor vehicle emission budgets. We may, however, reconsider this proposal if, based on new information or public comments, we find that the State has not satisfied the statutory criteria for a Serious area $PM_{2.5}$ attainment plan. The EPA also proposes to disapprove the portions of the State's Serious area plan, and the contingency provisions of a third SIP submission regarding residential wood burning, that pertain to the Serious area contingency measurement requirements for the 2012 annual $PM_{2.5}$ NAAQS.

DATES: Any comments must arrive by January 28, 2022.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R09–OAR–2021–0884, at *https://www.regulations.gov.* For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. 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 will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Rory Mays, Air Planning Office (AIR–2), EPA Region IX, (415) 972–3227, *mays.rory@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us,'' and ''our'' refer to the EPA.

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I. Background for Proposed Action

On January 15, 2013, the EPA strengthened the primary annual NAAQS for particulate matter with a diameter of 2.5 microns or less ($PM_{2.5}$) by lowering the level from 15.0 micrograms per cubic meter (μg/m³) to 12.0 μg/m³ (''2012 annual $PM_{2.5}$ NAAQS'').[1] The EPA established these standards after considering substantial evidence from numerous health studies demonstrating that serious health effects are associated with exposures to $PM_{2.5}$ concentrations above these levels.

Epidemiological studies have shown statistically significant correlations between elevated $PM_{2.5}$ levels and premature mortality. Other important health effects associated with $PM_{2.5}$ exposure include aggravation of respiratory and cardiovascular disease (as indicated by increased hospital admissions, emergency room visits, absences from school or work, and restricted activity days), changes in lung function, and increased respiratory symptoms. Individuals particularly sensitive to $PM_{2.5}$ exposure include older adults, people with heart and lung disease, and children.[2] Sources can emit $PM_{2.5}$ directly into the atmosphere as a solid or liquid particle (''primary $PM_{2.5}$'' or ''direct $PM_{2.5}$'') or it can form in the atmosphere (''secondary $PM_{2.5}$'') as a result of various chemical reactions among precursor pollutants such as nitrogen oxides (NO_X), sulfur oxides (SO_X), volatile organic compounds (VOC), and ammonia (NH_3).[3]

Following promulgation of a new or revised NAAQS, the EPA is required by CAA section 107(d) to designate areas throughout the nation as attaining or not attaining the NAAQS. On January 15, 2015, the EPA designated and classified the SJV as Moderate nonattainment for the 2012 annual $PM_{2.5}$ NAAQS.[4] The EPA has approved the State's demonstration that it was impracticable to attain the 2012 annual $PM_{2.5}$ NAAQS by the outermost December 31, 2021 Moderate area attainment date and related plan elements addressing the Moderate area requirements for the 2012 annual $PM_{2.5}$ NAAQS, except for the contingency measure element, which the EPA disapproved.[5] In that same action, the EPA reclassified the SJV as a Serious nonattainment area for these NAAQS.

On December 27, 2021, the effective date of the SJV's reclassification as a Serious $PM_{2.5}$ nonattainment area, the SJV will become subject to a new statutory attainment date no later than the end of the tenth calendar year following designation (*i.e.,* December

[1] 78 FR 3086 and 40 CFR 50.18. The EPA first established NAAQS for $PM_{2.5}$ on July 18, 1997 (62 FR 38652), including annual standards of 15.0 μg/m³ based on a 3-year average of annual mean concentrations and 24-hour (daily) standards of 65 μg/m³ based on a 3-year average of 98th percentile 24-hour concentrations (40 CFR 50.7) (''1997 $PM_{2.5}$ NAAQS''). In addition, on October 17, 2006, the EPA strengthened the 24-hour (daily) NAAQS for $PM_{2.5}$ by lowering the level from 65 μg/m³ to 35 μg/m³ (''2006 24-hour $PM_{2.5}$ NAAQS''). 71 FR 61144 and 40 CFR 50.13. Unless otherwise noted, all references to the $PM_{2.5}$ standards in this notice, including all instances of ''2012 annual $PM_{2.5}$ NAAQS,'' are to the 2012 primary annual NAAQS of 12.0 μg/m³ codified at 40 CFR 50.18.

[2] 78 FR 3086, 3088.

[3] EPA, Air Quality Criteria for Particulate Matter, No. EPA/600/P–99/002aF and EPA/600/P–99/002bF, October 2004.

[4] 80 FR 2206 (codified at 40 CFR 81.305).

[5] 86 FR 67343 (November 26, 2021).

31, 2025) and the requirement to submit a Serious area plan satisfying the requirements of CAA Title I, part D, including the requirements of subpart 4, for the 2012 annual $PM_{2.5}$ NAAQS.[6] As explained in the EPA's final reclassification action, the Serious area plan for the SJV must include, among other things, provisions to assure that, under CAA section 189(b)(1)(B), the best available control measures (BACM) for the control of direct $PM_{2.5}$ and $PM_{2.5}$ precursors shall be implemented no later than four years after the area is reclassified and a demonstration (including air quality modeling) that the plan provides for attainment as expeditiously as practicable but no later than December 31, 2025, or by the most expeditious alternative date practicable and no later than December 31, 2030, in accordance with the requirements of CAA sections 189(b) and 188(e). As described in our final action reclassifying the SJV as a Serious $PM_{2.5}$ nonattainment area, California must adopt and submit a SIP submission addressing the Serious nonattainment area requirements for the 2012 annual $PM_{2.5}$ NAAQS within 18 months (*i.e.,* by June 27, 2023), for emissions inventories, BACM, and nonattainment new source review (NSR), and by December 31, 2023, for the attainment demonstration and related planning requirements.

The SJV $PM_{2.5}$ nonattainment area encompasses over 23,000 square miles and includes all or part of eight counties: San Joaquin, Stanislaus, Merced, Madera, Fresno, Tulare, Kings, and the valley portion of Kern.[7] The area is home to four million people and is the nation's leading agricultural region. Stretching over 250 miles from north to south and averaging 80 miles wide, it is partially enclosed by the Coast Mountain range to the west, the Tehachapi Mountains to the south, and the Sierra Nevada range to the east. The CAA assigns primary responsibility to the state for developing plans to attain the NAAQS. Under State law, California divides this responsibility between the San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD or District) and the California Air Resources Board (CARB) in preparing attainment plans. Authority for regulating sources under state jurisdiction in the SJV is split between the District, which has responsibility for regulating stationary and most area sources, and CARB, which has responsibility for regulating most mobile sources.

II. Summary and Completeness Review of Applicable SIP Submissions

The EPA is proposing action on portions of three SIP revisions submitted by CARB to meet the Serious nonattainment area requirements for the 2012 annual $PM_{2.5}$ NAAQS in the SJV. Specifically, the EPA is proposing to act on those portions of the following two plan submissions that pertain to the Serious area requirements for the 2012 annual $PM_{2.5}$ NAAQS: The ''2018 Plan for the 1997, 2006, and 2012 $PM_{2.5}$ Standards,'' adopted by the SJVUAPCD on November 15, 2018, and by CARB on January 24, 2019 (''2018 $PM_{2.5}$ Plan'');[8] and the ''San Joaquin Valley Supplement to the 2016 State Strategy for the State Implementation Plan,'' adopted by CARB on October 25, 2018 (''Valley State SIP Strategy'').

We refer to the relevant portions of these SIP submissions collectively in this proposal as the ''SJV $PM_{2.5}$ Plan'' or ''Plan.'' The SJV $PM_{2.5}$ Plan addresses attainment plan requirements for multiple $PM_{2.5}$ NAAQS in the SJV, including the Serious area attainment plan requirements for the 2012 annual $PM_{2.5}$ NAAQS. CARB submitted the SJV $PM_{2.5}$ Plan to the EPA as a revision to the California SIP on May 10, 2019.[9] It became complete by operation of law on November 10, 2019.[10]

In addition, the EPA is proposing action on the portion of a third SIP submission that pertains to SJVUAPCD Rule 4901, as amended by the District on June 20, 2019, and submitted to the EPA on July 19, 2019 (''Rule 4901 Contingency Provision''). The EPA has already taken final action on the rule modification for this submission.[11] In this action we are evaluating the submission for purposes of addressing the contingency measures requirement in the SJV for the 2012 annual $PM_{2.5}$ NAAQS.

CAA sections 110(a)(1) and (2) and 110(l) require each state to provide reasonable public notice and opportunity for public hearing prior to the adoption and submission of a SIP or SIP revision to the EPA. To meet this requirement, every SIP submission should include evidence that adequate public notice was given and that an opportunity for a public hearing was provided consistent with the EPA's implementing regulations in 40 CFR 51.102.

CAA section 110(k)(1)(B) requires the EPA to determine whether a SIP submission is complete within 60 days of receipt. This section also provides that any plan that the EPA has not affirmatively determined to be complete or incomplete will become complete by operation of law six months after the date of submission. The EPA's SIP completeness criteria are found in 40 CFR part 51, Appendix V.

A. San Joaquin Valley 2018 $PM_{2.5}$ Plan

The following portions of the 2018 $PM_{2.5}$ Plan and related support documents address the Serious area requirements for the 2012 annual $PM_{2.5}$ NAAQS in the SJV: (i) Chapter 4 (''Attainment Strategy for $PM_{2.5}$''); (ii) Chapter 7 (''Demonstration of Federal Requirements for the 2012 $PM_{2.5}$ Standard'');[12] (iii) numerous appendices to the 2018 $PM_{2.5}$ Plan; (iv) CARB's ''Staff Report, Review of the San Joaquin Valley 2018 Plan for the 1997, 2006, and 2012 $PM_{2.5}$ Standards,'' release date December 21, 2018 (''CARB

[6] Id. at 67347.

[7] For a precise description of the geographic boundaries of the SJV $PM_{2.5}$ nonattainment area, see 40 CFR 81.305.

[8] The 2018 $PM_{2.5}$ Plan was developed jointly by CARB and the District.

[9] Letter dated May 9, 2019, from Richard W. Corey, Executive Officer, CARB, to Mike Stoker, Regional Administrator, EPA Region IX. Previously, in separate rulemakings, the EPA has finalized action on the portions of the SJV $PM_{2.5}$ Plan that pertain to the 1997 annual $PM_{2.5}$ NAAQS, the 2006 24-hour $PM_{2.5}$ NAAQS, and the Moderate area plan for the 2012 annual $PM_{2.5}$ NAAQS. See 86 FR 67329 (November 26, 2021) (final rule regarding the 1997 annual $PM_{2.5}$ NAAQS); 85 FR 44192 (July 22, 2020) (final rule regarding the 2006 24-hour $PM_{2.5}$ NAAQS, except contingency measures); and 86 FR 67343 (final rule regarding the Moderate area plan for the 2012 annual $PM_{2.5}$ NAAQS and contingency measures for the 2006 24-hour $PM_{2.5}$ NAAQS). The EPA has also separately proposed action on the portions of the SJV $PM_{2.5}$ Plan that pertain to the 1997 24-hour $PM_{2.5}$ NAAQS. 86 FR 53150 (September 24, 2021).

[10] We note that, with respect to plans previously required for the 1997, 2006, and 2012 $PM_{2.5}$ NAAQS, including the Moderate area plan only for the 2012 annual $PM_{2.5}$ NAAQS, the EPA had made findings of failure to submit effective January 7, 2019, that triggered sanctions clocks. 83 FR 62720 (December 6, 2018). Following the May 10, 2019 submission of the 2018 $PM_{2.5}$ Plan and Valley State SIP Strategy, the EPA affirmatively determined that the SIP submissions addressed the deficiency that was the basis for such findings, resulting in the termination of the associated sanctions clocks. Letter dated June 24, 2020, from Elizabeth Adams, Director, Air and Radiation Division, EPA Region IX, to Richard W. Corey, Executive Officer, CARB. However, neither the findings nor completeness determination applied to the Serious area plan for the 2012 annual $PM_{2.5}$ NAAQS as it was not yet required.

[11] 85 FR 44206 (July 22, 2020) (final approval of District Rule 4901); 85 FR 1131, 1132–33 (January 9, 2020) (proposed approval of District Rule 4901). Completeness review for this submission was conducted and described in that action. See also 86 FR 67329 (removing the contingency provision from the SIP).

[12] Chapter 5 (''Demonstration of Federal Requirements for the 1997 $PM_{2.5}$ Standard'') and Chapter 6 (''Demonstration of Federal Requirements for the 2006 $PM_{2.5}$ Standard'') of the 2018 $PM_{2.5}$ Plan pertain to the 1997 $PM_{2.5}$ NAAQS and 2006 24-hour $PM_{2.5}$ NAAQS, respectively.

Staff Report''); [13] and (v) the State's and District's board resolutions adopting the 2018 $PM_{2.5}$ Plan (CARB Resolution 19–1 and SJVUAPCD Governing Board Resolution 18–11–16).[14] The SJVUAPCD Governing Board Resolution 18–11–16 includes emission reduction commitments on which the SJV $PM_{2.5}$ Plan relies.[15]

The appendices to the 2018 $PM_{2.5}$ Plan, in order of their evaluation in this proposed rule, include: (i) App. B (''Emissions Inventory''); (ii) App. A (''Ambient $PM_{2.5}$ Data Analysis''); (iii) a plan precursor demonstration and clarifications, including App. G (''Precursor Demonstration'') and Attachment A (''Clarifying information for the San Joaquin Valley 2018 Plan regarding model sensitivity related to ammonia and ammonia controls'') to the CARB Staff Report; (iv) control strategy appendices, including App. C (''Stationary Source Control Measure Analyses''), App. D (''Mobile Source Control Measures Analyses''), and App. E (''Incentive-Based Strategy''); (v) modeling appendices, including App. J (''Modeling Emission Inventory''), App. K (''Modeling Attainment Demonstration''), and App. L (''Modeling Protocol''); (vi) App. H (''RFP, Quantitative Milestones, and Contingency''); and (vii) App. I (''New Source Review and Emission Reduction Credits''). The 2018 $PM_{2.5}$ Plan addresses motor vehicle emission budget requirements in the ''Transportation Conformity'' section of App. D (pages D–119 to D–131). The 2018 $PM_{2.5}$ Plan also includes an Executive Summary, Introduction (Ch. 1), chapters on ''Air Quality Challenges and Trends'' (Ch. 2) and ''Health Impacts and Health Risk Reduction Strategy'' (Ch. 3), and an appendix on ''Public Education and Technology Advancement'' (App. F).

The District provided public notice and opportunity for public comment prior to its November 15, 2018 public hearing on and adoption of the 2018 $PM_{2.5}$ Plan.[16] CARB also provided public notice and opportunity for public comment prior to its January 24, 2019 public hearing on and adoption of the 2018 $PM_{2.5}$ Plan.[17] The SIP submission includes proof of publication of notices for the respective public hearings. It also includes copies of the written and oral comments received during the State's and District's public review processes and the agencies' responses thereto.[18] Therefore, we reaffirm that the 2018 $PM_{2.5}$ Plan meets the procedural requirements for public notice and hearing in CAA sections 110(a) and 110(l) and 40 CFR 51.102. The 2018 $PM_{2.5}$ Plan became complete by operation of law on November 10, 2019, pursuant to CAA section 110(k)(1)(B).

B. Valley State SIP Strategy

CARB developed the ''Revised Proposed 2016 State Strategy for the State Implementation Plan'' (''2016 State Strategy'') to support attainment planning in the SJV and Los Angeles-South Coast Air Basin (''South Coast'') ozone nonattainment areas.[19] In its resolution adopting the 2016 State Strategy (CARB Resolution 17–7), the Board found that the 2016 State Strategy would achieve 6 tons per day (tpd) of NO_X emission reductions and 0.1 tpd of direct $PM_{2.5}$ emission reductions in the SJV by 2025 from source categories under the regulatory authority of CARB. The resolution directed CARB staff to work with the SJVUAPCD to identify additional reductions from sources under District regulatory authority as part of a comprehensive plan to attain all of the $PM_{2.5}$ NAAQS for the SJV and to return to the Board with a commitment to achieve additional emission reductions from mobile sources.[20]

CARB responded to this resolution by developing and adopting the ''San Joaquin Valley Supplement to the 2016 State Strategy for the State Implementation Plan'' (''Valley State SIP Strategy'') to support the 2018 $PM_{2.5}$ Plan. The State's May 10, 2019 SIP submission incorporates by reference the Valley State SIP Strategy as adopted by CARB on October 25, 2018, and submitted to the EPA on November 16, 2018.[21]

The Valley State SIP Strategy includes an Introduction (Ch. 1), a chapter on ''Measures'' (Ch. 2), and a ''Supplemental State Commitment from the Proposed State Measures for the Valley'' (Ch. 3). Much of the content of the Valley State SIP Strategy is reproduced in Chapter 4 (''Attainment Strategy for $PM_{2.5}$'') of the 2018 $PM_{2.5}$ Plan.[22] The Valley State SIP Strategy also includes CARB Resolution 18–49, which, among other things, commits CARB to achieve specific amounts of NO_X and $PM_{2.5}$ emission reductions by specific years, for purposes of attaining the $PM_{2.5}$ NAAQS in the SJV.[23]

CARB provided the required public notice and opportunity for public comment prior to its October 25, 2018 public hearing on and adoption of the Valley State SIP Strategy.[24] The SIP submission includes proof of publication of the public notice for this public hearing. It also includes copies of the written and oral comments received during the State's public review process and CARB's responses thereto.[25] Therefore, we reaffirm that the Valley State SIP Strategy meets the procedural requirements for public notice and hearing in CAA sections 110(a) and 110(l) and 40 CFR 51.102. The Valley State SIP Strategy became complete by operation of law on November 10, 2019, pursuant to CAA section 110(k)(1)(B).

C. Rule 4901 Contingency Provision

Lastly, the 2018 $PM_{2.5}$ Plan addresses the contingency measure requirements for the 2012 annual $PM_{2.5}$ NAAQS by reference to, among other things, a District contingency measure, and

[13] The CARB Staff Report includes CARB's review of, among other things, the 2018 $PM_{2.5}$ Plan's control strategy and attainment demonstration. Letter dated December 11, 2019, from Richard W. Corey, Executive Officer, CARB to Mike Stoker, Regional Administrator, EPA Region IX, transmitting the CARB Staff Report.

[14] CARB Resolution 19–1, ''2018 $PM_{2.5}$ State Implementation Plan for the San Joaquin Valley,'' January 24, 2019, and SJVUAPCD Governing Board Resolution 18–11–16, ''Adopting the [SJVUAPCD] 2018 Plan for the 1997, 2006, and 2012 $PM_{2.5}$ Standards,'' November 15, 2018.

[15] SJVUAPCD Governing Board Resolution 18–11–16, paragraph 6, 10–11.

[16] SJVUAPCD, ''Notice of Public Hearing for Adoption of Proposed 2018 $PM_{2.5}$ Plan for the 1997, 2006, and 2012 Standards,'' October 16, 2018, and SJVUAPCD Governing Board Resolution 18–11–16.

[17] CARB, ''Notice of Public Meeting to Consider the 2018 $PM_{2.5}$ State Implementation Plan for the San Joaquin Valley,'' December 21, 2018, and CARB Resolution 19–1.

[18] CARB, ''Board Meeting Comments Log,'' March 29, 2019; J&K Court Reporting, LLC, ''Meeting, State of California Air Resources Board,'' January 24, 2019 (transcript of CARB's public hearing), and 2018 $PM_{2.5}$ Plan, App. M (''Summary of Significant Comments and Responses'').

[19] The EPA has approved certain commitments made by CARB in the 2016 State Strategy for purposes of attaining the ozone NAAQS in the SJV and South Coast ozone nonattainment areas. See, *e.g.,* 84 FR 3302 (February 12, 2019) and 84 FR 52005 (October 1, 2019).

[20] CARB Resolution 17–7, ''2016 State Strategy for the State Implementation Plan,'' March 23, 2017, 6–7.

[21] Letter dated May 9, 2019, from Richard W. Corey, Executive Officer, CARB, to Mike Stoker, Regional Administrator, EPA Region IX, 2.

[22] For example, Table 2 (proposed mobile source measures and schedule), Table 3 (emissions reductions from proposed mobile source measures), and Table 4 (summary of emission reduction measures) of the Valley State SIP Strategy correspond to tables 4–8, 4–9, and 4–7, respectively, of the 2018 $PM_{2.5}$ Plan, Chapter 4.

[23] CARB Resolution 18–49, ''San Joaquin Valley Supplement to the 2016 State Strategy for the State Implementation Plan,'' October 25, 2018, 5.

[24] CARB, ''Notice of Public Meeting to Consider the San Joaquin Valley Supplement to the 2016 State Strategy for the State Implementation Plan,'' September 21, 2018, and CARB Resolution 18–49.

[25] CARB, ''Board Meeting Comments Log,'' November 2, 2018 and compilation of written comments; and J&K Court Reporting, LLC, ''Meeting, State of California Air Resources Board,'' October 25, 2018 (transcript of CARB's public hearing).

emissions estimates for the year following the attainment year for use in evaluating whether the emissions reductions from the contingency measure are sufficient.[26] With respect to the District contingency measure, the 2018 $PM_{2.5}$ Plan calls for the District to amend District Rule 4901 (''Wood Burning Fireplaces and Wood Burning Heaters'') to include a provision in the rule with a trigger that would activate the requirements of the contingency measure should the EPA issue a determination or final rulemaking that the SJV failed to meet a regulatory requirement necessitating implementation of a contingency measure.

In response to the commitment made in the 2018 $PM_{2.5}$ Plan, in June 2019 the District adopted amendments to Rule 4901, including a new provision (codified as section 5.7.3 of the amended rule) that is structured to function as a contingency measure. On July 19, 2019, CARB submitted the amended rule to the EPA for approval.[27] The EPA took final action to approve the amended Rule 4901 (including the new section 5.7.3) into the California SIP, but in our approval we noted that we were not evaluating the contingency measure in section 5.7.3 of revised Rule 4901 for compliance with all requirements of the CAA and the EPA's implementing regulations that apply to such measures.[28] Rather, we approved the new provision (section 5.7.3) into the SIP as part of our approval of the entire amended rule as SIP strengthening because the provision strengthens the rule by providing a possibility of additional curtailment days and thus potentially additional emissions reductions. We indicated that we would evaluate whether section 5.7.3, in conjunction with other submitted provisions, meets the statutory and regulatory requirements for contingency measures in a future action.[29] In this document, we are evaluating District Rule 4901, and in particular section 5.7.3, in the context of our action on the contingency measure element in the 2018 $PM_{2.5}$ Plan for the 2012 annual $PM_{2.5}$ NAAQS.

III. Clean Air Act Requirements for $PM_{2.5}$ Serious Area Plans

Upon reclassification of a Moderate nonattainment area as a Serious nonattainment area under subpart 4 of part D, title I of the CAA, the Act requires the state to make a SIP submission that addresses the following Serious nonattainment area requirements:[30]

(1) A comprehensive, accurate, current inventory of actual emissions from all sources of $PM_{2.5}$ and $PM_{2.5}$ precursors in the area (CAA section 172(c)(3));

(2) Provisions to assure that the best available control measures (BACM), including best available control technology (BACT), for the control of direct $PM_{2.5}$ and all $PM_{2.5}$ precursors shall be implemented no later than four years after the area is reclassified (CAA section 189(b)(1)(B)), unless the state elects to make an optional precursor demonstration that the EPA approves authorizing the state not to regulate one or more of these pollutants;

(3) A demonstration (including air quality modeling) that the plan provides for attainment as expeditiously as practicable but no later than the end of the tenth calendar year after designation as a nonattainment area (*i.e.,* December 31, 2025, for the SJV for the 2012 annual $PM_{2.5}$ NAAQS) (CAA sections 188(c)(2) and 189(b)(1)(A)(i));

(4) Plan provisions that require reasonable further progress (RFP) (CAA section 172(c)(2));

(5) Quantitative milestones which are to be achieved every three years until the area is redesignated attainment and which demonstrate RFP toward attainment by the applicable date (CAA section 189(c));

(6) Provisions to assure that control requirements applicable to major stationary sources of $PM_{2.5}$ also apply to major stationary sources of $PM_{2.5}$ precursors, except where the state demonstrates to the EPA's satisfaction that such sources do not contribute significantly to $PM_{2.5}$ levels that exceed the standard in the area (CAA section 189(e));

(7) Contingency measures to be implemented if the area fails to meet RFP or to attain by the applicable attainment date (CAA section 172(c)(9)); and

(8) A revision to the nonattainment new source review (NSR) program to lower the applicable ''major stationary source''[31] thresholds from 100 tons per year (tpy) to 70 tpy (CAA section 189(b)(3)).

A state's Serious area plan must also satisfy the requirements for Moderate area plans in CAA section 189(a), to the extent the state has not already met those requirements in the Moderate area plan submitted for the area. In addition, the state's Serious area plan must meet the general requirements applicable to all SIP submissions under section 110 of the CAA, including the requirement to provide necessary assurances that the implementing agencies have adequate personnel, funding, and authority under section 110(a)(2)(E); and the requirements concerning enforcement provisions in section 110(a)(2)(C).

The EPA provided its preliminary views on the CAA's requirements for particulate matter plans under part D, title I of the Act in the following guidance documents: (1) ''State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990'' (''General Preamble'');[32] (2) ''State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990; Supplemental'' (''General Preamble Supplement'');[33] and (3) ''State Implementation Plans for Serious PM–10 Nonattainment Areas, and Attainment Date Waivers for PM–10 Nonattainment Areas Generally; Addendum to the General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990'' (''General Preamble Addendum'').[34] More recently, in an August 24, 2016 final rule entitled, ''Fine Particulate Matter National Ambient Air Quality Standards: State Implementation Plan Requirements'' (''$PM_{2.5}$ SIP Requirements Rule''), the EPA established regulatory requirements and provided further interpretive guidance on the statutory SIP requirements that apply to areas designated nonattainment for the $PM_{2.5}$ standards.[35] We discuss these regulatory requirements and interpretations of the Act as appropriate in our evaluation of the State's submissions below.

[26] 2018 $PM_{2.5}$ Plan, App. H (revised February 11, 2020), H–24 to H–26.

[27] Letter dated July 19, 2019, from Richard W. Corey, Executive Officer, CARB, to Mike Stoker, Regional Administrator, EPA Region IX.

[28] 85 FR 44206 (July 22, 2020) (final approval of District Rule 4901); 85 FR 1131, 1132–33 (January 9, 2020) (proposed approval of District Rule 4901).

[29] The EPA subsequently removed section 5.7.3 of Rule 4901 from the California SIP. 86 FR 67329 (final rule on 1997 annual $PM_{2.5}$ NAAQS portion of the SJV $PM_{2.5}$ Plan, including final disapproval of the contingency measures element for those NAAQS).

[30] 81 FR 58010, 58074–58075 (August 24, 2016).

[31] For any Serious area, the terms ''major source'' and ''major stationary source'' include any stationary source that emits or has the potential to emit at least 70 tons per year of $PM_{2.5}$. CAA section 189(b)(3) and 40 CFR 51.165(a)(1)(iv)(A)(*1*)(*vii*) and (*viii*) (defining ''major stationary source'' in serious $PM_{2.5}$ nonattainment areas).

[32] 57 FR 13498 (April 16, 1992).

[33] 57 FR 18070 (April 28, 1992).

[34] 59 FR 41998 (August 16, 1994).

[35] 81 FR 58010.

IV. Review of the San Joaquin Valley $PM_{2.5}$ Serious Area Plan

A. Emissions Inventory

1. Requirements for Emissions Inventories

CAA section 172(c)(3) requires that each SIP include a comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant or pollutants in the nonattainment area. The EPA discussed the emissions inventory requirements that apply to $PM_{2.5}$ nonattainment areas, including Serious area requirements, in the $PM_{2.5}$ SIP Requirements Rule and codified these requirements in 40 CFR 51.1008.[36] The EPA has also issued guidance concerning emissions inventories for $PM_{2.5}$ nonattainment areas.[37]

The base year emissions inventory should provide a state's best estimate of actual emissions from all sources of the relevant pollutants in the area, *i.e.,* all emissions that contribute to the formation of a particular NAAQS pollutant. For the $PM_{2.5}$ NAAQS, the base year inventory must include direct $PM_{2.5}$ emissions, separately reported filterable and condensable $PM_{2.5}$ emissions,[38] and emissions of all chemical precursors to the formation of secondary $PM_{2.5}$: Nitrogen oxides (NO_X), sulfur dioxide (SO_2), volatile organic compounds (VOC), and ammonia (NH_3).[39] In addition, the emissions inventory base year for a Serious $PM_{2.5}$ nonattainment area must be one of the three years for which monitored data were used to reclassify the area to Serious, or another technically appropriate year justified by the state in its Serious area plan submission.[40]

A state's SIP submission must include documentation explaining how it calculated emissions data for the inventory. In estimating mobile source emissions, a state should use the latest emissions models and planning assumptions available at the time it developed the submission. The latest EPA-approved version of California's mobile source emission factor model for estimating tailpipe, brake, and tire wear emissions from on-road mobile sources that was available during the State's and District's development of the SJV $PM_{2.5}$ Plan was EMFAC2014.[41] Following CARB's submission of the Plan, the EPA approved EMFAC2017, the latest revision to this motor vehicle emissions model for SIP purposes.[42] States are also required to use the EPA's ''Compilation of Air Pollutant Emission Factors'' (''AP–42'') road dust method for calculating re-entrained road dust emissions from paved roads.[43]

In addition to the base year inventory submitted to meet the requirements of CAA section 172(c)(3), the state must also submit a projected attainment year inventory and emissions projections for each RFP milestone year.[44] These future emissions projections are necessary components of the attainment demonstration required under CAA section 189(b)(1) and the demonstration of RFP required under section 172(c)(2).[45] Emissions projections for future years (which are referred to in the Plan as ''forecasted inventories'') should account for, among other things, the ongoing effects of economic growth and adopted emissions control requirements. The state's SIP submission should include documentation to explain how it calculated the emissions projections. Where a state chooses to allow new major stationary sources or major modifications to use emission reductions credits (ERCs) that were generated through shutdown or curtailed emissions units occuring before the base year of an attainment plan, the projected emissions inventory used to develop the attainment demonstration must explicitly include the emissions from such previously shutdown or curtailed emissions units.[46]

Summary of State's Submission

The State included summaries of the planning emissions inventories for direct $PM_{2.5}$ and all $PM_{2.5}$ precursors (NO_X, SO_X,[47] VOC,[48] and ammonia) and the documentation for the inventories for the SJV $PM_{2.5}$ nonattainment area in Appendix B (''Emissions Inventory'') and Appendix I (''New Source Review and Emission Reduction Credits'') of the 2018 $PM_{2.5}$ Plan. In addition, Appendix J (''Modeling Emission Inventory'') contains inventory documentation specific to the air quality modeling inventories. These portions of the 2018 $PM_{2.5}$ Plan contain annual average daily emission inventories for 2013 through 2028 projected from the 2012 actual emissions inventory,[49] including the 2013 base year, the 2019 and 2022 RFP milestone years, the 2025 Serious area attainment year, and a 2028 post-attainment RFP year. The State used both the annual average and the winter average daily inventories to evaluate emission sources for the 2012 annual $PM_{2.5}$ NAAQS in the 2018 $PM_{2.5}$ Plan.[50]

The State selected 2013 for the base year emission inventory, building on the 2012 actual emissions inventory and considering available air quality data, trends, and field studies.[51] Specifically, the State worked with local air districts and selected 2012 for the actual emissions inventory as it aligned with the 2012 data collection year of the Multiple Air Toxics Exposure Study IV (MATES IV)[52] of the South Coast Air Quality Management District (SCAQMD) and to maintain consistency across various California air quality plans.[53] The State then projected the

[36] Id. at 58078–58079.

[37] EPA, ''Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations,'' May 2017 (''Emissions Inventory Guidance''), available at *https://www.epa.gov/air-emissions-inventories/air-emissions-inventory-guidance-implementation-ozone-and-particulate.*

[38] The Emissions Inventory Guidance identifies the types of sources for which the EPA expects states to provide condensable PM emission inventories. Emissions Inventory Guidance, section 4.2.1 (''Condensable PM Emissions''), 63–65.

[39] 40 CFR 51.1008.

[40] 40 CFR 51.1008(b)(1).

[41] 80 FR 77337 (December 14, 2015). EMFAC is short for *EM*ission *FAC*tor. The EPA announced the availability of the EMFAC2014 motor vehicle emissions model, effective on the date of publication in the **Federal Register**, for use in state implementation plan development and transportation conformity in California. We note that CARB's use of EMFAC2014 in developing the emission inventories for the Serious area plan for the 2012 annual $PM_{2.5}$ NAAQS preceded the requirement to adopt and submit such Serious area plan.

[42] 84 FR 41717 (August 15, 2019).

[43] The EPA released an update to AP–42 in January 2011 that revised the equation for estimating paved road dust emissions based on an updated data regression that included new emission tests results. 76 FR 6328 (February 4, 2011). CARB used the revised 2011 AP–42 methodology in developing on-road mobile source emissions. ''Miscellaneous Process Methodology 7.9 Entrained Road Travel, Paved Road Dust,'' CARB, November 2016.

[44] 40 CFR 51.1008 and 51.1012. Also, see Emissions Inventory Guidance, section 3 (''SIP Inventory Requirements and Recommendations'').

[45] 40 CFR 51.1004, 51.1008, 51.1011, and 51.1012.

[46] 40 CFR 51.165(a)(3)(ii)(C)(*1*).

[47] The SJV $PM_{2.5}$ Plan generally uses ''sulfur oxides'' or ''SO_X'' in reference to SO_2 as a precursor to the formation of $PM_{2.5}$. We use SO_X and SO_2 interchangeably throughout this notice.

[48] The SJV $PM_{2.5}$ Plan generally uses ''reactive organic gasses'' or ''ROG'' in reference to VOC as a precursor to the formation of $PM_{2.5}$. We use ROG and VOC interchangeably throughout this notice.

[49] 2018 $PM_{2.5}$ Plan, App. B, B–18.

[50] Id. at App. B, B–19. The base year inventory is from CEIDARS and future year inventories were estimated using CEPAM, version 1.05.

[51] Id. at App. L, 11–12.

[52] Additional information on the MATES IV study performed in 2012 is available at: *https://www.aqmd.gov/home/air-quality/air-quality-studies/health-studies/mates-iv.* SCAQMD performed the subsequent MATES V study in 2018 and issued the MATES V final report in August 2021. See *https://www.aqmd.gov/home/air-quality/air-quality-studies/health-studies/mates-v,* and ''MATES V, Multiple Air Toxics Exposure Study in the South Coast AQMD, Final Report,'' SCAQMD, August 2021.

[53] 2018 $PM_{2.5}$ Plan, App. B, B–18.

2013 base year emissions inventory (also referred to as the planning emissions inventory), presented in Appendix B of the Plan, from that 2012 actual emission inventory. Regarding the modeling emissions inventory, developed from the base year emissions inventory, the State conducted its base case modeling using 2013 for several reasons: Analysis of air quality trends, adjusted for meteorology, that indicated 2013 as a year conducive to ozone and $PM_{2.5}$ formation; availability of research-grade measurements of two significant pollution episodes in the DISCOVER–AQ field study of January to February 2013; and the relatively high design values for 2013, making it a conservative choice for attainment modeling.[54]

In addition, simultaneously with submission of the 2018 $PM_{2.5}$ Plan, the State submitted the Moderate area plan for the SJV for the 2012 annual $PM_{2.5}$ NAAQS, adopted by the District in 2016, that similarly used 2013 for the base year emissions inventory (''2016 $PM_{2.5}$ Plan''). In that plan, the State included a modeling demonstration that it would be impracticable for the SJV to attain the 2012 annual $PM_{2.5}$ NAAQS by the outermost Moderate area attainment date of December 31, 2021.[55] The modeling demonstration used three overlapping design value periods covering 2010–2014 and the 2013 base year emissions inventory to model the ambient air quality in 2021.

The State developed base year inventories in the 2018 $PM_{2.5}$ Plan for stationary sources using actual emissions reports made by facility operators. The State developed the base year emissions inventories for area sources using the most recent models and methodologies available at the time the State was developing the 2018 $PM_{2.5}$ Plan.[56] The 2018 $PM_{2.5}$ Plan includes background, methodology, and inventories of condensable and filterable $PM_{2.5}$ emissions from stationary point and non-point combustion sources that are expected to generate condensable $PM_{2.5}$.[57] It provides filterable and condensable emissions estimates, expressed as annual $PM_{2.5}$ emissions (tons per year), for all of the identified source categories for the years relevant for the 2012 annual $PM_{2.5}$ NAAQS Serious area plan requirements, including the 2013 base year, the 2019 and 2022 RFP years, the 2025 Serious area attainment year, and a 2028 post-attainment RFP year.

CARB used EMFAC2014, which was the EPA-approved model at the time CARB developed and submitted the inventories, to estimate on-road motor vehicle emissions based on transportation activity data from the 2014 Regional Transportation Plans adopted by the transportation planning agencies in the SJV.[58] Re-entrained paved road dust emissions were calculated using a CARB methodology consistent with the EPA's AP–42 road dust methodology.[59] CARB also provided emissions inventories for non-road equipment, including aircraft, trains, recreational boats, construction equipment, and farming equipment, among others. CARB uses a suite of category-specific models to estimate non-road emissions for many categories and, where a new model was not available, used the OFFROAD2007 model.[60]

CARB developed the emissions forecasts by applying growth and control profiles to the base year inventory. CARB's mobile source emissions projections take into account predicted activity rates and vehicle fleet turnover by vehicle model year and adopted controls.[61] In the 2018 $PM_{2.5}$ Plan, the District provides for use of pre-base year ERCs as offsets by accounting for such ERCs in the projected emissions inventory for the 2025 attainment year.[62] The Plan identifies growth factors, control factors, and estimated offset use between 2013 and 2025, for direct $PM_{2.5}$, NO_X, SO_X, and VOC emissions by source category and lists all pre-base year ERCs issued by the District for PM_{10},[63] NO_X, SO_X, and VOC emissions by facility.[64]

Table 1 provides a summary of the 2018 $PM_{2.5}$ Plan's winter (24-hour) average inventories in tpd of direct $PM_{2.5}$ and $PM_{2.5}$ precursor emissions for the 2013 base year. Table 2 provides a summary of the 2018 $PM_{2.5}$ Plan's annual average inventories of direct $PM_{2.5}$ and $PM_{2.5}$ precursor emissions for the 2013 base year. For purposes of this proposal, these annual average inventories provide bases primarily for our evaluation of the precursor demonstration, control measure analysis, attainment demonstration, RFP demonstration, and motor vehicle emissions budgets (''budgets'') in the 2018 $PM_{2.5}$ Plan with respect to the Serious area attainment plan requirements for the 2012 annual $PM_{2.5}$ NAAQS.

TABLE 1—SAN JOAQUIN VALLEY WINTER AVERAGE EMISSIONS INVENTORY FOR DIRECT $PM_{2.5}$ AND $PM_{2.5}$ PRECURSORS FOR THE 2013 BASE YEAR

[tpd]

Category	Direct $PM_{2.5}$	NO_X	SO_X	VOC	Ammonia
Stationary Sources	8.5	35.0	6.9	86.6	13.9
Area Sources	41.4	11.5	0.5	156.8	291.5
On-Road Mobile Sources	6.4	188.7	0.6	51.1	4.4
Non-Road Mobile Sources	4.4	65.3	0.3	27.4	0.0
Totals [a]	60.8	300.5	8.4	321.9	309.8

Source: 2018 $PM_{2.5}$ Plan, Appendix B, tables B–1 through B–5.

[54] Id. at App. L, 12. The State presents further information in the ''APPENDIX: San Joaquin Valley $PM_{2.5}$ SIP (2018)'' of Appendix L, and highlights that 2013 was one of the worst years in the decade preceding 2018 for $PM_{2.5}$ pollution in the SJV, underscoring its use as a conservative base year for modeling attainment of the 2012 annual $PM_{2.5}$ NAAQS. 2018 $PM_{2.5}$ Plan, Ch. 7, 7–6.

[55] 2016 $PM_{2.5}$ Plan, Ch. 2, section 2.3 (''Summary of Modeling Results'') and App. A (''Air Quality Modeling''). The EPA has summarized the State's impracticability demonstration in greater detail in our proposed rule on the 2016 $PM_{2.5}$ Plan. 86 FR 49100, 49113 (September 1, 2021).

[56] 2018 $PM_{2.5}$ Plan, App. B, section B.2 (''Emissions Inventory Summary and Methodology'').

[57] Id. at App. B, B–42 to B–44.

[58] Id. at App. B, B–37. We note that the vehicle miles traveled data used in the 2018 $PM_{2.5}$ Plan's emissions inventory is from the final 2017 Federal Transportation Improvement Program from each of the SJV's eight metropolitan planning organizations.

[59] Id. at App. B, B–28.

[60] Id. at App. B, B–38 through B–40. The EPA regulations refer to ''non-road'' vehicles and engines whereas CARB regulations refer to ''Other Mobile Sources'' or ''off-road'' vehicles and engines. These terms refer to the same types of vehicles and engines. We refer herein to such vehicles and engines as ''non-road'' sources.

[61] Id. at App. B, B–19.

[62] Id. at App. I, I–1 through I–5.

[63] Particulate matter with a diameter of 10 microns or less.

[64] 2018 $PM_{2.5}$ Plan, App. I, tables I–1 through I–5.

[a] Totals reflect disaggregated emissions and may not add exactly as shown here due to rounding.

TABLE 2—SAN JOAQUIN VALLEY ANNUAL AVERAGE EMISSIONS INVENTORY FOR DIRECT $PM_{2.5}$ AND $PM_{2.5}$ PRECURSORS FOR THE 2013 BASE YEAR

[tpd]

Category	Direct $PM_{2.5}$	NO_X	SO_X	VOC	Ammonia
Stationary Sources	8.8	38.6	7.2	87.1	13.9
Area Sources	41.5	8.1	0.3	153.4	310.9
On-Road Mobile Sources	6.4	183.1	0.6	49.8	4.4
Non-Road Mobile Sources	5.8	87.4	0.3	33.8	0.0
Totals [a]	62.5	317.2	8.5	324.1	329.2

Source: 2018 $PM_{2.5}$ Plan, Appendix B, tables B–1 through B–5.
[a] Totals reflect disaggregated emissions and may not add exactly as shown here due to rounding.

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The inventories in the 2018 $PM_{2.5}$ Plan include the latest version of California's mobile source emissions model, EMFAC2014, that the EPA had approved at the time the State made the SIP submissions, and the EPA's most recent AP–42 methodology for paved road dust. The inventories comprehensively address all source categories in the SJV $PM_{2.5}$ nonattainment area and are consistent with the EPA's inventory guidance.

In accordance with 40 CFR 51.1008(b)(1), the EPA has evaluated the State's justification for using 2013 for the base year emissions inventory as a technically appropriate inventory year for the 2012 annual $PM_{2.5}$ NAAQS Serious area plan for the SJV. In particular, the State describes the technical bases for the selection of 2013 for the modeling emissions inventory, explaining that 2013 was conducive to $PM_{2.5}$ formation in the SJV; the important DISCOVER–AQ field study measured two significant pollution episodes in the SJV in January to February 2013; and the 2013 design values (across monitoring sites) were relatively high in comparison to other recent years,[65] making it a conservative choice for future air quality projections for RFP and attainment of the 2012 annual $PM_{2.5}$ NAAQS. We agree that these points make 2013 both a conservative year for modeling future air quality and one that aligns the comprehensive, accurate, and recent emissions inventory at the time the State developed and submitted the 2018 $PM_{2.5}$ Plan with empirical data from the DISCOVER–AQ field study.

The EPA's approval of the State's demonstration that it was impracticable to attain the 2012 annual $PM_{2.5}$ NAAQS by 2021 and reclassification of the SJV to Serious for the 2012 annual $PM_{2.5}$ NAAQS was based foremost on the State's modeled demonstration.[66] While we also considered the 2018–2020 design values (across monitoring sites) as part of our evaluation, such ambient air quality data was not available in 2017–2018 when CARB and the District were developing the 2018 $PM_{2.5}$ Plan.

Therefore, the EPA proposes to find the State's justification for selecting 2013 for the base year emissions inventory to be technically appropriate, consistent with 40 CFR 51.1008(b)(1). Furthermore, the 2013 base year represents actual annual average emissions of all sources within the nonattainment area. Direct $PM_{2.5}$ and $PM_{2.5}$ precursors are included in the inventories, and filterable and condensable direct $PM_{2.5}$ emissions are identified separately.

With respect to future year baseline projections, we have reviewed the growth and control factors estimated by the State and propose to find them acceptable and thus conclude that the future baseline emissions projections in the 2018 $PM_{2.5}$ Plan reflect appropriate calculation methods and the latest planning assumptions at the time the State and District were developing the Plan and its emissions inventory. Also, as a general matter, the EPA will approve a SIP submission that takes emissions reduction credit for a control measure only where the EPA has approved the measure as part of the SIP. Thus, for example, to take credit for the emissions reductions from newly adopted or amended District rules for stationary and area sources, the related rules must be approved by the EPA into the SIP.

In our rulemaking on the State's attainment plan for the 2006 24-hour $PM_{2.5}$ NAAQS in the SJV, we reviewed the baseline measures identified as 2018 $PM_{2.5}$ Plan baseline controls to ensure that the measures that are relied upon in the plan are submitted and approved as part of the California SIP.[67] We reaffirm that the stationary and area source baseline measures in the 2018 $PM_{2.5}$ Plan are approved into the SIP and support the emissions reductions for future years in the SJV, with two exceptions discussed in section IV.F.3.a of the proposed rule that would not materially affect the attainment demonstration in the Plan. With respect to mobile sources, the EPA has acted in recent years to approve CARB mobile source regulations into the state-wide portion of the California SIP.[68] We therefore propose to find that the future year baseline projections in the 2018 $PM_{2.5}$ Plan are properly supported by SIP-approved stationary, area, and mobile source measures.[69]

[65] EPA design value workbook dated May 24, 2021, ''pm25_designvalues_2018_2020_final_05_24_21.xlsx,'' worksheets ''Table3a.''

[66] 86 FR 67343, 67345. See also, 86 FR 49100, 49117–49118 (proposed rule on State's Moderate area plan).

[67] EPA Region IX, ''Technical Support Document, General Evaluation, San Joaquin Valley $PM_{2.5}$ Plan for the 2006 $PM_{2.5}$ NAAQS,'' February 2020 (''EPA's General Evaluation TSD''). Table V–A of EPA's General Evaluation TSD shows District rules with post-2013 compliance dates that are reflected in the future year baseline inventories of the 2018 $PM_{2.5}$ Plan, along with information on the EPA's approval of these rules.

[68] See, *e.g.*, 81 FR 39424 (June 16, 2016), 82 FR 14447 (March 21, 2017), and 83 FR 23232 (May 18, 2018).

[69] The baseline emissions projections in the 2018 $PM_{2.5}$ Plan assume implementation of CARB's zero emissions vehicle (ZEV) sales mandate and greenhouse gas (GHG) standards, based on the EMFAC2014 model that was the current EPA-approved model available at the time of the SIP's development and the assumptions that were available at that time. On September 27, 2019, the U.S. Department of Transportation and the EPA (the Agencies) issued the joint action known as the ''Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program'' (''SAFE I'') that, among other things, withdrew the EPA's 2013 waiver of preemption of CARB's ZEV sales mandate and vehicle GHG standards. 84 FR 51310 (September 27, 2019). See also proposed SAFE rule at 83 FR 42986 (August 24, 2018). On April 30, 2020 (85 FR 24174), the Agencies issued a notice of final rulemaking for the ''The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks'' (''SAFE II''), establishing the federal fuel economy and GHG vehicle emissions standards based on the

For these reasons, we are proposing to approve the 2013 base year emissions inventory in the 2018 $PM_{2.5}$ Plan as meeting the requirements of CAA section 172(c)(3) and 40 CFR 51.1008. We are also proposing to find that the future year baseline inventories in the 2018 $PM_{2.5}$ Plan satisfy the requirements of 40 CFR 51.1008(b)(2) and 51.1012(a)(2) and provide an adequate basis for the control measure, attainment, and RFP demonstrations for the 2012 annual $PM_{2.5}$ NAAQS in the 2018 $PM_{2.5}$ Plan.

B. $PM_{2.5}$ Precursors

Requirements for Control of $PM_{2.5}$ Precursors

The provisions of subpart 4 of part D, title I of the CAA do not define the term ''precursor'' for purposes of $PM_{2.5}$, nor do they explicitly require the control of any specifically identified PM precursor. The statutory definition of ''air pollutant'' in CAA section 302(g), however, provides that the term ''includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term 'air pollutant' is used.'' The EPA has identified NO_X, SO_2, VOC, and ammonia as precursors to the formation of $PM_{2.5}$.[70] Accordingly, the attainment plan requirements of subpart 4 apply to emissions of all four precursor pollutants and direct $PM_{2.5}$ from all types of stationary, area, and mobile sources, except as otherwise provided in the Act (*e.g.,* in CAA section 189(e)).

Section 189(e) of the Act requires that the control requirements for major stationary sources of direct PM_{10} (which includes $PM_{2.5}$) also apply to major stationary sources of PM_{10} precursors, except where the Administrator determines that such sources do not contribute significantly to PM_{10} levels that exceed the standard in the area. Section 189(e) contains the only express exception to the control requirements under subpart 4 (*e.g.,* requirements for reasonably available control measures (RACM), reasonably available control technology (RACT), BACM, BACT, most stringent measures (MSM), and nonattainment NSR). Although section 189(e) explicitly addresses only major stationary sources, the EPA interprets the Act as authorizing it also to determine, under appropriate circumstances, that regulation of specific $PM_{2.5}$ precursors from other source categories in a given nonattainment area is not necessary. For example, under the EPA's longstanding interpretation of the control requirements that apply to stationary and mobile sources of PM_{10} precursors in the nonattainment area under CAA section 172(c)(1) and subpart 4,[71] a state may demonstrate in a SIP submission that control of a certain precursor pollutant is not necessary in light of its insignificant contribution to ambient PM_{10} levels in the nonattainment area.[72]

Under the $PM_{2.5}$ SIP Requirements Rule, a state may elect to submit to the EPA a ''comprehensive precursor demonstration'' for a specific nonattainment area to show that emissions of a particular precursor from all existing sources located in the nonattainment area do not contribute significantly to $PM_{2.5}$ levels that exceed the standard in the area.[73] If the EPA determines that the contribution of the precursor to $PM_{2.5}$ levels in the area is not significant and approves the demonstration, the state is not required to control emissions of the relevant precursor from existing sources in the attainment plan.[74]

In addition, in May 2019, the EPA issued the ''$PM_{2.5}$ Precursor Demonstration Guidance'' (''$PM_{2.5}$ Precursor Guidance''), which provides recommendations to states for analyzing nonattainment area $PM_{2.5}$ emissions and developing such optional precursor demonstrations, consistent with the $PM_{2.5}$ SIP Requirements Rule.[75] The EPA developed recommended contribution thresholds to help assess whether a precursor significantly contributes to $PM_{2.5}$ levels above the NAAQS. The thresholds are based on the size of $PM_{2.5}$ differences that are distinguishable statistically in monitored data. If the chemical component of $PM_{2.5}$ ambient concentrations corresponding to emissions of a precursor (*e.g.,* the concentration of sulfate, which corresponds to SO_2 emissions) is below the threshold, that is evidence that the precursor does not significantly contribute. If the precursor fails this concentration-based test, the State can use a sensitivity-based test, in which the modeled sensitivity or response of ambient $PM_{2.5}$ concentrations to changes in emissions of the precursor is estimated and then compared to the threshold. In addition to comparing the concentration or modeled response to the threshold, the State can consider other information in assessing whether the precursor significantly contributes. The EPA's recommended annual average contribution threshold for the annual $PM_{2.5}$ NAAQS is 0.2 $\mu g/m^3$.[76]

We are evaluating the 2018 $PM_{2.5}$ Plan with respect to the Serious area attainment plan requirements in accordance with the presumption embodied within subpart 4 that the State must address all $PM_{2.5}$ precursors in its evaluation of potential control measures, unless the State adequately demonstrates that emissions of a particular precursor or precursors do not contribute significantly to ambient $PM_{2.5}$ levels that exceed the $PM_{2.5}$ NAAQS in the nonattainment area. In reviewing any determination by the State to exclude a $PM_{2.5}$ precursor from the required evaluation of potential control measures, we consider both the magnitude of the precursor's contribution to ambient $PM_{2.5}$ concentrations in the nonattainment area and the sensitivity of ambient $PM_{2.5}$ concentrations in the area to reductions in emissions of that precursor in accordance with the $PM_{2.5}$ Precursor Guidance.

Summary of State's Submission

The State's precursor demonstration and conclusions are found in Chapter 7 (''Demonstration of Federal Requirements for 2012 $PM_{2.5}$ Standard'') and Appendix G (''Precursor Demonstration'') of the 2018 $PM_{2.5}$ Plan. CARB also provides clarifying information on its precursor assessment, including an Attachment A to its letter transmitting the 2018 $PM_{2.5}$ Plan to the

August 2018 SAFE proposal. The effect of both SAFE final rules (SAFE I and SAFE II) on the on-road vehicle mix in the SJV nonattainment area and on the resulting vehicular emissions is expected to be minimal during the timeframe addressed in this SIP revision. Therefore, we anticipate the SAFE final rules would not materially change the demonstration of attainment of the 2012 annual $PM_{2.5}$ NAAQS in the SJV by the Serious area attainment date of December 31, 2025.

[70] 81 FR 58010, 58018.

[71] General Preamble, 13539–13542.

[72] Courts have upheld this approach to the requirements of subpart 4 for PM_{10}. See, *e.g., Assoc. of Irritated Residents* v. *EPA, et al.,* 423 F.3d 989 (9th Cir. 2005).

[73] 40 CFR 51.1006(a)(1).

[74] Id.

[75] ''$PM_{2.5}$ Precursor Demonstration Guidance,'' EPA–454/R–19–004, May 2019, including Memo dated May 30, 2019, from Scott Mathias, Acting Director, Air Quality Policy Division and Richard Wayland, Director, Air Quality Assessment Division, Office of Air Quality Planning and Standards (OAQPS), EPA to Regional Air Division Directors, Regions 1–10, EPA. The $PM_{2.5}$ Precursor Guidance builds upon the draft version of the guidance, released on November 17, 2016 (''Draft $PM_{2.5}$ Precursor Guidance''), which CARB referenced in developing its precursor demonstration in the SJV $PM_{2.5}$ Plan. ''$PM_{2.5}$ Precursor Demonstration Guidance, Draft for Public Review and Comments,'' EPA–454/P–16–001, November 17, 2016, including Memo dated November 17, 2016, from Stephen D. Page, Director, OAQPS, EPA to Regional Air Division Directors, Regions 1–10, EPA.

[76] $PM_{2.5}$ Precursor Guidance, 17.

EPA [77] and further clarifications in five email transmittals.[78]

The State estimates that anthropogenic emissions of NO_X, ammonia, SO_X, and VOC will decrease by 64 percent (%), 1%, 6%, and 9%, respectively, between 2013 and 2025.[79] The 2018 $PM_{2.5}$ Plan provides both concentration-based and sensitivity-based analyses of precursor contributions to ambient $PM_{2.5}$ concentrations in the SJV. Based on these analyses, the State concludes that emissions of NO_X (as well as direct $PM_{2.5}$) contribute significantly to ambient $PM_{2.5}$ levels that exceed the $PM_{2.5}$ NAAQS in the SJV but ammonia, SO_X, and VOC do not contribute significantly to such exceedances.

We summarize the State's analyses and conclusions for ammonia, SO_X, and VOC in the following paragraphs. For a more detailed summary of the precursor demonstration in the Plan, please refer to two EPA technical support documents (TSDs): The first covers all the precursors and the second one specifically addresses ammonia. The first TSD is the EPA's ''Technical Support Document, EPA Evaluation of $PM_{2.5}$ Precursor Demonstration, San Joaquin Valley $PM_{2.5}$ Plan for the 2006 $PM_{2.5}$ NAAQS,'' February 2020 (''EPA's $PM_{2.5}$ Precursor TSD''), which provides the EPA's summary of the State's precursor analyses for all four $PM_{2.5}$ precursors. Most of our analysis in the EPA's $PM_{2.5}$ Precursor TSD is applicable to the portion of the Plan pertaining to the Serious area plan for the 2012 annual $PM_{2.5}$ NAAQS. For example, the State's precursor demonstration used 2015 annual average concentration data for its concentration-based analysis, examined both 24-hour and annual average sensitivities of ambient $PM_{2.5}$ concentrations to reductions in each precursor in 2013, 2020, and 2024, and presented information on research studies and emission trends that are relevant for assessing the sensitivity of both 24-hour average and annual average ambient $PM_{2.5}$ concentrations to emission reductions of each $PM_{2.5}$ precursor. Our evaluation of such factors, as described in the EPA's $PM_{2.5}$ Precursor TSD, is similarly applicable for the 2012 annual $PM_{2.5}$ NAAQS.

With respect to ammonia emission reductions, the EPA's $PM_{2.5}$ Precursor TSD summarizes the State's analysis of 24-hour average sensitivity of ambient $PM_{2.5}$ concentrations across monitoring sites and years (see Table 2 of the EPA's $PM_{2.5}$ Precursor TSD). The EPA's second TSD, ''Technical Support Document, EPA Evaluation of Ammonia Precursor Demonstration, San Joaquin Valley Moderate Area $PM_{2.5}$ Plan for the 2012 $PM_{2.5}$ NAAQS,'' August 2021 (''EPA's Ammonia Precursor TSD''), summarizes the annual average sensitivity of ambient $PM_{2.5}$ concentrations to ammonia emission reductions (see Table 2 of the EPA's Ammonia Precursor TSD) and provides further summary and context with respect to the State's ammonia precursor demonstration for the 2012 annual $PM_{2.5}$ NAAQS.

For ammonia, SO_X, and VOC, CARB assesses the 2015 annual average concentration of each precursor in ambient $PM_{2.5}$ at Bakersfield, for which the necessary speciated $PM_{2.5}$ data was available and where the highest $PM_{2.5}$ design values have been recorded in most years, and compares those concentrations to the recommended annual average contribution threshold of 0.2 μg/m³.[80] CARB concludes that the 2015 annual average contributions of ammonia, SO_X, and VOC are 5.2 μg/m³, 1.6 μg/m³ and 6.2 μg/m³, respectively.

For ammonia, SO_X, and VOC, the State modeled the sensitivity of ambient $PM_{2.5}$ to 30% and 70% reductions in anthropogenic emissions of each precursor pollutant for modeled years 2013, 2020, and 2024. The year 2013 is the 2018 $PM_{2.5}$ Plan's base year; 2020 is the modeled attainment year for the 1997 $PM_{2.5}$ NAAQS; and 2024 is the modeled attainment year for the 2006 24-hour $PM_{2.5}$ NAAQS. For the 2012 annual $PM_{2.5}$ NAAQS, the modeled attainment year is 2025, but the State did not conduct precursor sensitivity modeling for that additional year. Instead the State assumed that 2024 and 2025 would have very similar results; [81] and results for 2024 were used as a proxy for those of 2025. Emissions totals for those two years are within 0.2% of each other for all pollutants, except that NO_X emissions are 3% lower in 2025.[82] Depending on the analysis year and percentage precursor emission reduction, the sensitivity of ambient $PM_{2.5}$ to reductions in annual average precursor emissions ranges from 0.08 μg/m³ to 2.30 μg/m³ for ammonia; from –0.05 μg/m³ to 0.15 μg/m³ for SO_X; and from –0.50 μg/m³ to 0.40 μg/m³ for VOC.[83]

For ammonia, the modeled sensitivity of ambient $PM_{2.5}$ levels to a 30% or 70% emission reduction exceeds 0.2 μg/m³ in certain years at specific monitoring sites. As discussed in section IV.B.3.a of this proposed rule, for the 30% reduction results for 2024, upon which the State primarily relied, 2 out of 15 monitoring sites have responses above the threshold and the ambient $PM_{2.5}$ response declines substantially from 2020 to 2024, with the decline being generally larger for the sites with the highest projected $PM_{2.5}$ levels. In contrast, for SO_X and VOC, the modeled sensitivity of ambient $PM_{2.5}$ levels to a 30% or 70% emission reduction in either precursor is below 0.2 μg/m³ in all model scenarios except one, including a disbenefit (*i.e.,* ambient $PM_{2.5}$ levels increase when precursor emissions are reduced) at some monitoring sites for both precursors. For 2013, the State's modeling shows an ambient $PM_{2.5}$ change greater than 0.2 μg/m³ at 7 out of 15 monitoring sites in response to a 70% VOC emission reduction. According to the State, however, such sensitivity results do not reflect the current atmospheric chemistry in the SJV given the projected emission reductions from 2013 to 2024 for all four $PM_{2.5}$ precursors, especially for VOC and NO_X, as further described in this proposed rule.

[77] Letter dated May 9, 2019, from Richard W. Corey, Executive Officer, CARB, to Michael Stoker, Regional Administrator, EPA Region IX, Attachment A (''Clarifying information for the San Joaquin Valley 2018 Plan regarding model sensitivity related to ammonia and ammonia controls'').

[78] Email dated June 20, 2019, ''RE: SJV model disbenefit from SO_X reduction,'' from Jeremy Avise, CARB, to Scott Bohning, EPA Region IX, with attachment (''CARB's June 2019 Precursor Clarification''); email dated September 19, 2019, ''FW: SJV species responses,'' from Jeremy Avise, CARB, to Scott Bohning, EPA Region IX, with attachments (''CARB's September 2019 Precursor Clarification''); email dated October 18, 2019, from Laura Carr, CARB, to Scott Bohning, Jeanhee Hong, and Rory Mays, EPA Region IX, with attachment ''Clarifying Information on Ammonia'' (''CARB's October 2019 Precursor Clarification''); email dated April 19, 2021, from Laura Carr, CARB, to Rory Mays, EPA Region IX, Subject: ''Ammonia update,'' with attachment ''Update on Ammonia in the San Joaquin Valley'' (''CARB's April 19, 2021 Precursor Clarification''); and email dated April 26, 2021, from Laura Carr, CARB, to Scott Bohning, EPA Region IX, Subject: ''RE: Ammonia update,'' with attachment ''Ammonia in San Joaquin Valley'' (''CARB's April 26, 2021, Precursor Clarification'').

[79] 2018 $PM_{2.5}$ Plan, Ch. 7, 7–5 and Table 7–2. We also note that a copy of the contents of the 2018 $PM_{2.5}$ Plan, App. G appears in the CARB Staff Report, App. C4 (''Precursor Demonstrations for Ammonia, SO_X, and ROG'').

[80] 2018 $PM_{2.5}$ Plan, App. G, 3. The 2018 $PM_{2.5}$ Plan presents a graphical representation of annual average ambient $PM_{2.5}$ components (*i.e.,* crustal particulate matter, elemental carbon, organic matter, ammonium sulfate, and ammonium nitrate) for 2011–2013 for Bakersfield, Fresno, and Modesto. 2018 $PM_{2.5}$ Plan, Ch. 3, 3–3 to 3–4.

[81] Id. at Ch. 7, 7–7, and App. G, 10.

[82] 2018 $PM_{2.5}$ Plan, App. B. As discussed below, the lower NO_X emissions in 2025 compared to 2024 mean that the $PM_{2.5}$ response to ammonia reductions would be lower than those stated in the Plan's precursor demonstration; using 2024 results is more conservative than using 2025 results.

[83] Id. at App. G, tables 2 through 7 for ammonia, tables 8 and 9 for SO_X, and tables 10 through 15 for VOC.

The State supplemented the sensitivity analysis, particularly for ammonia, with consideration of additional information such as emission trends, the appropriateness of future year versus base year sensitivity, available emission controls, and the severity of nonattainment.[84] These factors were identified in the then-available Draft $PM_{2.5}$ Precursor Guidance, as well as in the final $PM_{2.5}$ Precursor Guidance, as factors that may be relevant to a sensitivity-based contribution analysis.[85]

The State notes that a 53% reduction in (baseline) NO_X emissions is projected to occur between 2013 and 2024,[86] so the conditions in the early years will not persist and the future year is more representative of the Valley's ambient conditions than earlier years. The 2018 $PM_{2.5}$ Plan's precursor demonstration also presents a review of District agricultural rules that control VOC emissions and also provide ammonia co-benefits. The State concludes that a 30% reduction is a reasonable upper bound on the ammonia reductions to model. Finally, the 2018 $PM_{2.5}$ Plan's precursor demonstration presents extensive support for the State's conclusion regarding an ambient excess of ammonia relative to NO_X, *i.e.,* that particulate ammonium nitrate formation is NO_X-limited, and will become increasingly NO_X-limited as NO_X reductions increase into the future.

EPA Evaluation and Proposed Action

The EPA has evaluated the State's precursor demonstration in the 2018 $PM_{2.5}$ Plan, as well as other relevant information available to the EPA, consistent with the $PM_{2.5}$ SIP Requirements Rule and the recommendations in the $PM_{2.5}$ Precursor Guidance. Based on this evaluation, the EPA agrees with the State's conclusion that NO_X emissions contribute significantly to ambient $PM_{2.5}$ levels that exceed the 2012 annual $PM_{2.5}$ NAAQS in the SJV and that NO_X emission sources, therefore, remain subject to control requirements under subparts 1 and 4 of part D, title I of the Act. Additionally, for the reasons provided in the following paragraphs, the EPA proposes to approve the State's comprehensive precursor demonstrations for ammonia, SO_X, and VOC based on a conclusion that emissions of these precursor pollutants do not contribute significantly to ambient $PM_{2.5}$ levels that exceed the 2012 annual $PM_{2.5}$ NAAQS in the SJV.

The State based its analyses on the latest available data and studies concerning ambient $PM_{2.5}$ formation in the SJV from precursor emissions. For the required concentration-based analysis, the State assessed the absolute annual average contribution of each precursor to ambient $PM_{2.5}$ (*i.e.,* in 2015). Given that the absolute concentrations in 2015 were above the EPA's recommended contribution thresholds for both the 24-hour and annual average $PM_{2.5}$ NAAQS, the State proceeded to a sensitivity-based analysis, consistent with the $PM_{2.5}$ SIP Requirements Rule.

For the sensitivity-based analysis, the State performed its analyses based on the EPA's recommended approach—*i.e.,* for each modeled year and level of precursor emissions reduction (in percentages), the State estimated the ambient $PM_{2.5}$ response using the procedure recommended in the $PM_{2.5}$ Precursor Guidance, and compared the result to the EPA's recommended contribution threshold. In particular, the State considered the EPA's recommended range of emission reductions (30% to 70%) for the 2013 base year, 2020 (an interim year), and the 2024 future year, and quantified the estimated response of ambient $PM_{2.5}$ concentrations to precursor emission changes in the SJV.

The State's emissions projections in the 2018 $PM_{2.5}$ Plan show that baseline emissions of each of these precursors will decrease from the 2013 base year to both 2021 and 2025. These decreases are included in the State's modeled projections of ambient $PM_{2.5}$ levels in the SJV for purposes of demonstrating attainment and RFP. The State's sensitivity analyses are consistent with these projections, in accordance with the EPA's recommendations in the $PM_{2.5}$ Precursor Guidance.[87]

In the subsections that follow, we summarize our evaluation of the State's precursor demonstrations for ammonia, SO_X, and VOC for purposes of the 2012 annual $PM_{2.5}$ NAAQS in the SJV.

(a) Ammonia Precursor Demonstration

In the 2018 $PM_{2.5}$ Plan, CARB estimates the ambient $PM_{2.5}$ response to both a 30% and a 70% emissions reduction in 2013, 2020, and 2024. We have evaluated CARB's sensitivity-based contribution analyses for 2013, 2020, and 2024 (in the 2018 $PM_{2.5}$ Plan) and CARB's determination that 2024 results are representative of conditions in the SJV for purposes of a sensitivity-based analysis, as discussed in the following paragraphs. The EPA's $PM_{2.5}$ Precursor Guidance explicitly provides for consideration of a future year, such as the attainment year.[88] We consider it appropriate for the State to take into account additional information as part of its evaluation of whether the ammonia contribution is significant and to rely on the responses to the 30% modeled ammonia emissions reduction in its precursor demonstration for ammonia. The State primarily relied on the 30% reduction results after concluding that 30% was a reasonable upper bound on potential ammonia reductions, based on past research on ammonia emissions and potential control options for agricultural sources. The EPA agrees that this is a reasonable upper bound on ammonia emissions reductions to use in the precursor demonstration, as discussed in EPA's approval of the precursor demonstration for the 2006 24-hour $PM_{2.5}$ NAAQS.[89] We provide a detailed evaluation of the State's precursor demonstration for ammonia emissions in the EPA's Ammonia Precursor TSD.

The precursor demonstration in the 2018 $PM_{2.5}$ Plan indicates that the ambient response to a 30% ammonia emission reduction would exceed the EPA's recommended contribution threshold of 0.2 $\mu g/m^3$ for 14 out of 15 monitoring sites in the 2013 analysis year, and at 9 out of 15 for the 2020 analysis year. For the 2024 analysis year, 2 of the 15 sites would exceed the contribution threshold, Madera and Hanford. In absolute terms, the ambient $PM_{2.5}$ response declines from 0.24 $\mu g/m^3$ in 2020 to 0.12 $\mu g/m^3$ in 2024 at Bakersfield-Planz, the highest concentration site. The Madera and Hanford responses decline, respectively, from 0.36 to 0.21 $\mu g/m^3$, and from 0.42 to 0.26 $\mu g/m^3$. The average response over all monitoring sites declines from 0.23 $\mu g/m^3$ to 0.14 $\mu g/m^3$, with the decline being generally larger for the sites with the highest projected $PM_{2.5}$ levels.

While the Madera and Hanford responses to ammonia reductions are above the contribution threshold, additional information about these locations leads the EPA to give these responses lower weight in the overall assessment of whether ammonia contributes significantly to $PM_{2.5}$ levels. The State notes that the 2013 base year Madera monitored concentrations are

[84] Id. at App. G, 5.

[85] $PM_{2.5}$ Precursor Guidance, 18–19 (consideration of additional information), 31 (available emission controls), and 35–36 (appropriateness of future year versus base year sensitivity).

[86] 2018 $PM_{2.5}$ Plan, App. G, 8.

[87] $PM_{2.5}$ Precursor Guidance, 35.

[88] Id.

[89] 85 FR 17382 (March 27, 2020), 17395; EPA's $PM_{2.5}$ Precursor TSD, 13.

biased high,[90] which would lead to model estimates of the response to ammonia reductions that are biased high (because for model projections, relative responses of the model to emissions changes are applied to monitored concentrations). While the State did not discuss the evidence for this in detail in its 2018 $PM_{2.5}$ Plan, it is consistent with an analysis of Madera measured concentrations that the State provided in a prior $PM_{2.5}$ plan for the SJV.[91] The EPA has previously discussed that the Madera data for the limited period of 2011 to 2013 are not representative for purposes of an attainment demonstration.[92]

For the 2018 $PM_{2.5}$ Plan precursor demonstration, Madera's ambient $PM_{2.5}$ response in 2024 to a 30% ammonia emissions reduction was 0.21 μg/m^3, just 5% above EPA's recommended contribution threshold of 0.2 μg/m^3. Because the 2024 modeling starting point was a base design value using monitored concentrations from 2010–2014, if more typical Madera concentrations were used, it is likely that the 2024 Madera response to ammonia reductions would be below the contribution threshold. Moreover, given the NO_X emission reductions that are projected to continue from 2024 to 2025, the EPA expects that $PM_{2.5}$ sensitivity to ammonia reductions would decrease from the 0.21 μg/m^3 unadjusted value in 2024 to a lower value in 2025, likely decreasing even the unadjusted, biased-high value to below the threshold.

There is also information suggesting that the Hanford response to ammonia reductions may be lower than indicated in the State's 2018 $PM_{2.5}$ Plan precursor demonstration. An independent study using aircraft and surface data from the winter 2013 DISCOVER–AQ[93] campaign, a key period in the 2018 $PM_{2.5}$ Plan's 2013 base year, found that the Community Multiscale Air Quality (CMAQ) model underestimated ammonia at Hanford by roughly a factor of five; Hanford is just outside a region with high ammonia emissions in the model (western Tulare County).[94] If the model's ammonia concentrations were higher to better match observations, then there would be relatively more ammonia per NO_X; ammonia then would be less of a limiting factor for particulate ammonium nitrate formation and the model response to ammonia reductions would be lower. This phenomenon is described more fully below.

The 2018 $PM_{2.5}$ Plan did not include an evaluation of model performance for ammonia per se (just for particulate ammonium), but in supplemental transmittals[95] CARB described the results of two analyses confirming the likely underestimation of ammonia. CARB compared CMAQ model predictions of ammonia with the 2013 DISCOVER–AQ aircraft measurements and found that ammonia was underpredicted, and noted that this would result in the $PM_{2.5}$ response to ammonia reductions being overpredicted. CARB also compared 2017 satellite measurements of ammonia with CMAQ model predictions and found that modeled ammonia concentrations were half of the magnitude of the satellite observations at some locations, and the modeled average in the SJV was about 25% less than observed. CARB concluded that the model tends to overpredict the sensitivity of ammonium nitrate formation to ammonia emission reductions. CARB also speculated that the underprediction could be partly be explained by the underestimation of ammonia emissions using current methodologies.[96] If modeled ammonia concentrations were closer to observations, *e.g.,* via increased emissions in the model, then the modeled response to ammonia precursor reductions would be lower than shown in the 2018 $PM_{2.5}$ Plan's precursor demonstration. An increase in modeled ambient ammonia (such as via a larger emissions estimate) would also make the model response more consistent with the evidence from the ambient measurement studies that are discussed next.

As additional information for assessing the contribution of ammonia to $PM_{2.5}$, the State discussed evidence from multiple ambient measurement studies.[97] The studies suggest a very low ambient sensitivity to ammonia, based on measured excess ammonia relative to NO_X, the abundance of particulate nitrate relative to gaseous NO_X, and the large abundance of ammonia relative to nitric acid. The studies all conclude that there is a large amount of ammonia left over after reacting with NO_X, so that ammonia emission reductions would be expected mainly to reduce the amount of ammonia excess, rather than to reduce the particulate amonium nitrate. These ambient studies provide strong evidence independent of the modeling that $PM_{2.5}$ would respond only weakly to ammonia emissions reductions.

Another consideration is that the $PM_{2.5}$ benefit of ammonia emission reductions is projected to decline steeply over time. In selecting the analysis year for a precursor demonstration, we believe it is appropriate to consider changes in atmospheric chemistry that may occur between the base or current year and the attainment year because the changes may ultimately affect the nonattainment area's progress toward expeditious attainment. The $PM_{2.5}$ Precursor Guidance explicitly states that a future year may be used, and that there are a multitude of considerations in choosing the analysis year.[98] The ''anticipated growth or loss of sources . . . or trends in ambient speciation data and precursor emissions''[99] are among the ''facts and circumstances of the area''[100] to consider in determining the significance of a precursor. The Guidance states that a future year could be more appropriate if it better represents the period that sources will operate in. As discussed in more detail below, the 2024 model results better

[90] 2018 $PM_{2.5}$ Plan, App. G, 14.

[91] ''Assessment of the Representativeness of 2011 $PM_{2.5}$ Beta Attenuation Monitor Data from Madera,'' in ''Staff Report, ARB Review of San Joaquin Valley $PM_{2.5}$ State Implementation Plan,'' adopted by CARB on May 21, 2015, App. A, ''Weight of Evidence Analysis.''

[92] 81 FR 6936, 6971 (February 9, 2016). The conclusion that 2011–2013 Madera data was biased high was based on it not fitting the north-south concentration gradient historically seen in relations to other monitors, a comparison to data from a second monitor at the same site, and the return to the historic pattern after adjustments were made to instrument operation after checking its zero point. The data is considered valid in the EPA's Air Quality System (AQS) for purposes of assessing whether the NAAQS is met. However, the EPA considered it to be anomalously high for that period, and not representative for use in modeling. Adjusted substituted data from nearby monitors had concentrations about 10% lower, and were accepted by the EPA for the demonstration of attainment of the 1997 annual $PM_{2.5}$ NAAQS.

[93] NASA, ''Deriving Information on Surface conditions from COlumn and VERtically Resolved Observations Relevant to Air Quality,'' described at *https://www.nasa.gov/mission_pages/discover-aq/index.html.*

[94] Kelly, J.T. *et al.* 2018, ''Modeling NH_4NO_3 over the San Joaquin Valley during the 2013 DISCOVER–AQ campaign,'' Journal of Geophysical Research: Atmospheres, 123, 4727–4745, *https://doi.org/10.1029/2018JD028290* at 4733. The paper notes that, despite the ammonia underestimation, model performance was good for particulate ammonium nitrate and the ammonium nitrate was not sensitive to the ammonia underestimate since its formation was NO_X-limited.

[95] CARB's April 19, 2021, Precursor Clarification and CARB's April 26, 2021, Precursor Clarification.

[96] As discussed in EPA's Ammonia Precursor TSD, there is evidence that ammonia emisions are underestimated, based on comparsons between satellite measurements and what would be expected from emissions inventories.

[97] 2018 $PM_{2.5}$ Plan, 6–7, and App. G, G–9 to G–10; the CARB 2018 Staff Report, App. C, 12–15; and Submittal Letter, Attachment A. These studies are also discussed in the EPA's $PM_{2.5}$ Precursor TSD.

[98] $PM_{2.5}$ Precursor Guidance, 35.

[99] Id. at 18.

[100] $PM_{2.5}$ SIP Requirements Rule, 40 CFR 51.1006(a)(1)(ii).

represent the period that ammonia sources will operate in, because of the steep decline in NO_X emissions projected to occur by 2024 and 2025. We consider it reasonable for the State to focus on the ambient $PM_{2.5}$ response to ammonia emission reductions in 2024, rather than an earlier year, as the modeled response in 2024 in the SJV better reflects the potential benefit of ammonia control measures for purposes of expeditious attainment of the 2012 annual $PM_{2.5}$ NAAQS.

The State's precursor demonstration in the 2018 $PM_{2.5}$ Plan shows that ambient sensitivity to ammonia emission reductions in the SJV declines steeply over time. Between 2020 and 2024, the modeled response to a 30% ammonia emission reduction declines by 50% at the Bakersfield-Planz monitoring site, which has the highest projected $PM_{2.5}$ level, and by 37% averaged over all monitoring sites.[101] As noted above, in absolute terms, the ambient $PM_{2.5}$ response declines from 0.24 μg/m³ in 2020 to 0.12 μg/m³ in 2024 at Bakersfield-Planz, which has the highest projected $PM_{2.5}$ design value, and from 0.23 μg/m³ to 0.14 μg/m³ as averaged over all monitoring sites, with the decline being generally larger for the sites with the highest projected $PM_{2.5}$ levels. Thus, between 2020 and 2024, the number of sites at which modeled sensitivity exceeds the 0.2 μg/m³ threshold declines from 9 out of 15 down to 1 or 2 out of 15.[102] As discussed above, ammonia sensitivity declines because of the shifting atmospheric chemistry caused by NO_X emissions decreases. NO_X emissions are projected to decrease 27% between 2020 and 2024 due to baseline measures (*e.g.,* existing motor vehicle controls). The decreased NO_X emissions will make ammonia more abundant relative to NO_X, and even less of a limiting factor on $PM_{2.5}$ formation. In other words, the model response in the future year 2024 gives a more realistic assessment of the potential effect of ammonia controls than past or current conditions. Between 2024 and 2025, the attainment year, NO_X emissions are projected to decrease by an additional 3.5% from 2024 levels,[103] so that the response to ammonia reductions in the attainment year would be lower than the 2024 results reported in the Plan.

Finally, based on the 2024 sensitivity results,[104] if ammonia emissions were reduced by 30%, the area's projected 12.0 μg/m³ design value, occurring at the Bakersfield-Planz monitoring site, would be reduced by 0.12 μg/m³, which would not be considered significant (it is below the EPA's recommended threshold of 0.2 μg/m³).

In sum, we conclude that the State quantified the sensitivity of ambient $PM_{2.5}$ levels to reductions in ammonia emissions using appropriate modeling technique; the modeled response to ammonia reductions is likely lower than reported; and the State's choice of 2024 and 2025 as the reference points for purposes of evaluating the sensitivity of ambient $PM_{2.5}$ levels to ammonia emission reductions is well-supported. Based on all of these considerations, the EPA proposes to approve the State's demonstration that ammonia emissions do not contribute significantly to ambient $PM_{2.5}$ levels that exceed the 2012 annual $PM_{2.5}$ NAAQS in the SJV.

(b) SO_X Precursor Demonstration

In the 2018 $PM_{2.5}$ Plan, CARB estimated the 2013 ambient $PM_{2.5}$ response to a 30% SO_X emission reduction to range from −0.01 μg/m³ to 0.07 μg/m³ and estimated the ambient $PM_{2.5}$ response to a 70% SO_X emission reduction to range from −0.05 μg/m³ to 0.15 μg/m³.[105] The State also provides an emissions trend chart that shows SO_X emissions to be steady at approximately 8 tpd from 2013 through 2024. Given that the relative levels of estimated SO_X and ammonia emissions over that timeframe remain similar, the State concludes that the 2013 sensitivities are also representative of future years.[106] The State also provides the ambient $PM_{2.5}$ responses in 2013, 2020, and 2024 to 30% and 70% reductions in SO_X emissions, all of which are below the 0.2 μg/m³ contribution threshold.[107]

We note that the 2018 $PM_{2.5}$ Plan's sensitivity estimates for 2013 are well below that threshold for both the 30% and 70% emission reduction scenarios and even negative for certain monitoring sites. Given those results and the steady SO_X emission levels over 2013 to 2025 (as opposed to increases), the EPA agrees with the State's conclusion that the 2013 modeled sensitivities provide a sufficient basis for the SO_X precursor demonstration. The supplemental results provided by the State for 2020 and 2024 support this conclusion.

Therefore, on the basis of these modeled ambient $PM_{2.5}$ responses to SO_X emission reductions in the SJV, and the facts and circumstances of the area, the EPA proposes to approve the State's demonstration that SO_X emissions do not contribute significantly to ambient $PM_{2.5}$ levels that exceed the 2012 annual $PM_{2.5}$ NAAQS in the SJV.

(c) VOC Precursor Demonstration

In the 2018 $PM_{2.5}$ Plan, the State found that the ambient $PM_{2.5}$ response to VOC emission reductions were generally below the EPA's recommended contribution threshold of 0.2 μg/m³, and predicted an increase in ambient $PM_{2.5}$ levels in response to VOC reductions (*i.e.,* a disbenefit) at 2 out of 15 monitoring sites in 2020, and 11 out of 15 sites in 2024. Only for a 70% emission reduction for the 2013 base year did the State predict the ambient $PM_{2.5}$ response to be above the threshold at a majority of sites.[108]

We note that the 2018 $PM_{2.5}$ Plan's sensitivity estimates for 2020 and 2024 are well below that threshold for both the 30% and 70% emission reduction scenarios, and even negative for certain monitoring sites. The State also provides an emissions trend chart that shows VOC emissions are projected to decrease by about 30 tpd, or 9% between 2013 and 2020 as well as between 2013 and 2024, and concludes that 2013 sensitivity results are not representative into the future and that the 2020 and 2024 results are representative.[109] Finally, the State concludes that VOC emissions do not contribute significantly to $PM_{2.5}$ levels that exceed the 2012 annual $PM_{2.5}$ NAAQS.

The EPA has evaluated and agrees with the State's determination in the 2018 $PM_{2.5}$ Plan that the projected 2024 year is more representative of conditions in the SJV for sensitivity-based analyses and that VOC reductions in 2024 would mostly result in a

[101] Extrapolating the 2018 $PM_{2.5}$ Plan results to 2025, the percent declines are 55% and 40%, respectively, which are larger still than those for 2024.

[102] 2018 $PM_{2.5}$ Plan, App. G, tables 4 and 5, G–11. As discussed above, the response for the Madera site is likely below the contribution threshold since its monitored concentrations are biased high.

[103] Annual average NO_X emissions are projected to decrease from 148.9 tpd in 2024 to 143.7 tpd in 2025. 2018 $PM_{2.5}$ Plan, App. B, Table B–2.

[104] 2018 $PM_{2.5}$ Plan, App. G, tables 5 and 7, 11–12. The response to 2025 ammonia reductions would be lower than the values stated in the text, due to the effect of declining NO_X emissions.

[105] Id. at App. G, 15–16, tables 8 and 9.

[106] 2018 $PM_{2.5}$ Plan, App. G, 15. The State includes modeling of 30% and 70% reductions of SO_X only for 2013, finding that the sensitivity of ambient $PM_{2.5}$ to such changes were below the EPA's recommended threshold, and that the 2020 and 2024 results would differ little from 2013 due to the similarity of emissions conditions over time. App. G, 17. CARB's September 2019 Precursor Clarification provides the 2020 and 2024 sensitivity results, which are indeed very close to those for 2013.

[107] CARB's September 2019 Precursor Clarification.

[108] 2018 $PM_{2.5}$ Plan, App. G, 18–19, tables 10 and 11.

[109] Id. at App. G, 19–20.

disbenefit to ambient $PM_{2.5}$ levels, seen at 11 of 15 monitoring sites. The EPA agrees that the 9% VOC emissions decrease from 2013 to 2024 supports reliance on the 2024 modeling results. Furthermore, there is projected to be a large decrease in NO_X emissions over this period, as described in section IV.B.2 of this proposed rule, that affects the atmospheric chemistry with respect to ambient $PM_{2.5}$ formation from VOC emissions. The 9% VOC emission reductions and the vast majority of NO_X emissions reductions are expected to result from baseline measures already in effect. Therefore, we conclude that it is reasonable to rely on future year 2024 modeled responses to VOC reductions. The EPA also concludes that the State provided a reasonable explanation for the VOC reduction disbenefit and evidence that it occurs in the SJV; as discussed in the EPA's $PM_{2.5}$ Precursor TSD, VOC reductions led to less peroxyacetyl nitrate formation, and so to greater availability of nitrate to form particulate ammonium nitrate.[110]

For these reasons, we propose to approve the State's demonstration that VOC emissions do not contribute significantly to ambient $PM_{2.5}$ levels that exceed the 2012 annual $PM_{2.5}$ NAAQS in the SJV.

C. Air Quality Modeling

1. Requirements for Air Quality Modeling

Section 189(b)(1)(A) of the CAA requires that each Serious area plan include a demonstration (including air quality modeling) that the plan provides for attainment of the $PM_{2.5}$ NAAQS by the applicable attainment date. As noted in sections I and II of this proposed rule, the outermost statutory Serious area attainment date for the 2012 annual $PM_{2.5}$ NAAQS in the SJV is December 31, 2025.

The $PM_{2.5}$ SIP Requirements Rule explains that Serious area plans under CAA section 189(b) must include a demonstration (including air quality modeling) that the control strategy provides for attainment of the $PM_{2.5}$ NAAQS as expeditiously as practicable.[111] For purposes of determining the attainment date that is as expeditious as practicable, the state must conduct future year modeling that takes into account emissions growth, known controls (including any controls that were previously determined to be RACM/RACT or BACM/BACT), and any other emissions controls that are needed for expeditious attainment of the NAAQS.

The EPA's $PM_{2.5}$ modeling guidance[112] (''Modeling Guidance'' and ''Modeling Guidance Update'') recommends that states use a photochemical model, such as the CMAQ model, to simulate a base case, with meteorological and emissions inputs reflecting a base case year to replicate concentrations monitored in that year. The Modeling Guidance recommends the following procedures for states to use in attainment demonstrations. The model should undergo a performance evaluation to ensure that it satisfactorily reproduces the concentrations monitored in the base case year. The model may then be used to simulate emissions occurring in other years required for an attainment plan, namely the base year (which may differ from the base case year) and future year.[113] The Modeling Guidance recommends that the modeled response to the emission changes between the base and future years be used to calculate relative response factors (RRFs). The modeled RRFs are then applied to the monitored design value in the base year to estimate the projected design value in the future year, which can be compared against the NAAQS. In the recommended procedure, the RRFs are calculated for each chemical species component of $PM_{2.5}$, and for each quarter of the year, to reflect their differing responses to seasonal meteorological conditions and emissions. Because each species is handled separately, before applying an RRF, the base year $PM_{2.5}$ design value must first be split into its species components, using available chemical species measurements. The Modeling Guidance provides additional detail on the recommended approach.[114]

2. Summary of State's Submission

The 2018 $PM_{2.5}$ Plan includes a modeled demonstration projecting that the SJV will attain the 2012 annual $PM_{2.5}$ NAAQS by December 31, 2025. The Plan's primary discussion of the photochemical modeling appears in Appendix K (''Modeling Attainment Demonstration'') of the 2018 $PM_{2.5}$ Plan. The State briefly summarizes the area's air quality problem in Chapter 2.2 (''Air Quality Challenges and Trends'') and summarizes the modeling results in Chapter 7.4 (''Attainment Demonstration and Modeling'') of the 2018 $PM_{2.5}$ Plan. The State provides a conceptual model of $PM_{2.5}$ formation in the SJV as part of the modeling protocol in Appendix L (''Modeling Protocol''). Appendix J (''Modeling Emission Inventory'') describes emission input preparation procedures. The State presents additional relevant information in Appendix C (''Weight of Evidence Analysis'') of the CARB 2018 Staff Report, which includes ambient trends and other data in support of the demonstration of attainment by 2025.

3. EPA Evaluation and Conclusion

CARB's air quality modeling approach investigated the many interconnected facets of modeling ambient $PM_{2.5}$ in the SJV, including model input preparation, model performance evaluation, use of the model output for the numerical NAAQS attainment test, and modeling documentation. Specifically, this required the development and evaluation of a conceptual model, modeling protocol, episode (*i.e.,* base year) selection, modeling domain, CMAQ model selection, initial and boundary condition procedures, meteorological model choice and performance, modeling emissions inventory preparation procedures, model performance, attainment test procedure, and adjustments to baseline air quality for modeling. These analyses are generally consistent with the EPA's recommendations in the Modeling Guidance.

The model performance evaluation in section 5.2 (''CMAQ Model Evaluation'') of Appendix K of the 2018 $PM_{2.5}$ Plan included statistical and graphical measures of model performance.

The EPA's evaluation of the modeling for the 2012 annual $PM_{2.5}$ NAAQS incorporates the evaluation that the EPA previously did for other NAAQS in the

[110] EPA's $PM_{2.5}$ Precursor TSD, 22.

[111] 40 CFR 51.1011(b)(1); 81 FR 58010, 58087.

[112] Memorandum dated November 29, 2018, from Richard Wayland, Air Quality Assessment Division, OAQPS, EPA, to Regional Air Division Directors, EPA, Subject: ''Modeling Guidance for Demonstrating Air Quality Goals for Ozone, $PM_{2.5}$, and Regional Haze,'' (''Modeling Guidance''), and Memorandum dated June 28, 2011, from Tyler Fox, Air Quality Modeling Group, OAQPS, EPA, to Regional Air Program Managers, EPA, Subject: ''Update to the 24 Hour $PM_{2.5}$ NAAQS Modeled Attainment Test,'' (''Modeling Guidance Update'').

[113] In this section, we use the terms ''base case,'' ''base year'' or ''baseline,'' and ''future year'' as described in section 2.3 of the EPA's Modeling Guidance. The ''base case'' modeling simulates measured concentrations for a given time period, using emissions and meteorology for that same year. The modeling ''base year'' (which can be the same as the base case year) is the emissions starting point for the plan and for projections to the future year, both of which are modeled for the attainment demonstration. Modeling Guidance, 37–38. Note that CARB sometimes uses ''base year'' synonymously with ''base case'' and ''reference year'' instead of ''base year.''

[114] Modeling Guidance, section 4.4, ''What is the Modeled Attainment Tests for the Annual Average $PM_{2.5}$ NAAQS.''

2018 $PM_{2.5}$ Plan. The EPA previously evaluated and approved the modeling conducted for the 2006 24-hour $PM_{2.5}$ NAAQS as part of the 2018 $PM_{2.5}$ Plan; see the EPA's ''Technical Support Document, EPA Evaluation of Air Quality Modeling, San Joaquin Valley $PM_{2.5}$ Plan for the 2006 $PM_{2.5}$ NAAQS,'' February 2020 (''EPA's 2006 NAAQS Modeling TSD'') accompanying that action for details.[115] The conclusions in the EPA's 2006 NAAQS Modeling TSD focused on the 2006 24-hour $PM_{2.5}$ NAAQS; in this notice we extend the evaluation with information specific to the 2012 annual $PM_{2.5}$ NAAQS.

Most aspects of the 2018 $PM_{2.5}$ Plan modeling and the EPA's evaluation of it are the same for the 24-hour and the annual averaging times, and the EPA has found them adequate. These include the modeling protocol, choice of model, meteorological modeling, modeling emissions inventory, choice of model, modeling domain, and procedures for model performance evaluation. One aspect that differs between the 24-hour and annual averaging times is the specific calculation procedure for estimating a future design value. In the procedure recommended in the Modeling Guidance for both averaging times, the model is used to calculate RRFs, the ratio of modeled future concentrations to base year concentrations, and the RRF is applied to monitored base year concentrations; this is done for each monitor, $PM_{2.5}$ species, and calendar quarter. But for the 24-hour averaging time, the recommended procedure uses the highest individual concentration days in each quarter, whereas for the annual average, it uses the average of all days in each quarter. For the current action on the 2018 $PM_{2.5}$ Plan, the EPA considers that the State procedures [116] for estimating future design values for the 2012 annual $PM_{2.5}$ NAAQS generally followed the EPA's recommendations and are adequate.

Another modeling aspect that can differ between 24-hour and annual average is the focus of the model performance evaluation on the respective averaging times. For the 24-hour average, it is especially important that modeled concentrations on the highest days are comparable to those on the highest monitored days because calculation of the design value for the 24-hour $PM_{2.5}$ NAAQS uses the 98th percentile concentrations. For the annual average, peak concentrations continue to be important, but lower concentration days are also important because all days are included in the average. Under- and over-predictions on non-peak days may average out and have little overall effect on the modeled annual concentration, but systematic underprediction on non-peak days could lead to model underprediction of the annual average concentration. This problem of model bias is mitigated by the use of the model in a relative sense as recommended in the Modeling Guidance. In the RRF, model bias ''cancels out'' to a degree since it would be present in both its numerator (future year) and its denominator (base year). Applying the RRF to monitored base year concentration in this way anchors the final model prediction to real-world concentrations. Further, the Modeling Guidance recommends that RRFs be calculated on a quarterly basis, to better account for emissions sources and atmospheric chemistry that differ between the seasons.

The 2018 $PM_{2.5}$ Plan did not include a separate model performance evaluation for the 24-hour and annual $PM_{2.5}$ averaging times; the State used statistical and graphical analyses applicable to both. The EPA evaluated the modeling for the 2012 annual $PM_{2.5}$ NAAQS using that same information, much of which has already been discussed in the EPA's 2006 NAAQS Modeling TSD. For the most part, in the EPA's 2006 NAAQS Modeling TSD, the EPA did not distinguish between the two averaging times either, but drew conclusions for the 24-hour averaging time rather than the annual averaging time. That TSD did note a relatively large negative normalized bias (underprediction) in the ammonium and nitrate performance statistics [117] for the 2nd quarter for monitoring sites in Bakersfield, Fresno, and Visalia; and we add here that the 3rd quarter has similar negative bias. Underprediction of total $PM_{2.5}$ in the 2nd and 3rd quarters is also evident in time series plots for most monitoring sites, though by only a small amount for several monitoring sites.[118] The RRF procedure removes much of this bias, so the underprediction in the model performance evaluation does not translate into an underpredicted 2025 design value. The EPA's 2006 NAAQS Modeling TSD noted that because those quarters have projected concentrations that are less than half of those in the 1st and 4th, this may have a small influence on annual average concentrations. It has still less influence on the 24-hour average, because peak 24-hour concentrations typically occur in winter, *i.e.,* in the 1st and 4th quarters. For example, the worst quarterly underprediction for nitrate was a for quarter 3, and occurred when quarterly total $PM_{2.5}$ concentration was 9.4 μg/m^3. By contrast, for quarter 1 nitrate had a small overprediction, and occurred when quarterly total $PM_{2.5}$ concentration was 21.1 μg/m^3. That is, nitrate predictions have more bias during the quarters with low $PM_{2.5}$ concentrations. This is apparent from the Plan's ''bugle'' plot for the four monitors with speciated data.[119] Large (negative) values of bias in nitrate predictions occur for the lowest quarterly nitrate concentrations. For the higher concentrations that most affect the annual average, nitrate fractional bias has a mixture of positive and negative values. For total $PM_{2.5}$, fractional bias has a similar seasonal pattern to that of nitrate, with underprediction during quarter 2 and quarter 3 when quarterly $PM_{2.5}$ concentration values are in the 5–10 μg/m^3 range, and small bias when quarterly concentrations are in the 20–30 μg/m^3 range. For the overall annual average, performance is good relative to that seen in other modeling studies with lower values of bias and error for multiple performance statistics for nitrate, as well as for the other $PM_{2.5}$ species and total $PM_{2.5}$.[120]

The high $PM_{2.5}$ concentration days are generally captured by the model, even though some are underpredicted in December at certain monitoring sites such as Fresno. Overall, the modeled site maxima are comparable to the measurements. Also, the frequency of high and low days generally matches observations so the annual as well as the daily model performance is acceptable.

The EPA evaluated, in our rulemaking with respect to the 2006 24-hour $PM_{2.5}$ NAAQS in the SJV, the State's choice of model and the extensive discussion in the 2018 $PM_{2.5}$ Plan about modeling procedures, tests, and performance analyses.[121] We consider the State's analyses consistent with the EPA's guidance on modeling for $PM_{2.5}$ attainment planning purposes. Based on these reviews, we propose to find that the modeling in the 2018 $PM_{2.5}$ Plan is adequate for the purposes of supporting

[115] The model performance is discussed further in section J (''Air Quality Model Performance'') of the EPA's 2006 NAAQS Modeling TSD.

[116] 2018 $PM_{2.5}$ Plan, App. K, 18.

[117] Id. at App. K, 48*ff,* tables 20 through 23.

[118] Id. at App. K, 131*ff,* Supplemental materials, Figures S.41–S.52.

[119] Id. at App. K, 53, Figure 13.

[120] Id. at App. K, 54, Figure 14.

[121] For a more detailed summary of the State's air quality modeling in the 2018 $PM_{2.5}$ Plan with respect to the 2006 24-hour $PM_{2.5}$ NAAQS, rather than the 2012 annual $PM_{2.5}$ NAAQS, please refer to the EPA's 2006 NAAQS Modeling TSD.

the State's RFP demonstration and the attainment demonstration.

D. Best Available Control Measures

1. Statutory and Regulatory Requirements

Section 189(b)(1)(B) of the Act requires for any serious $PM_{2.5}$ nonattainment area that the state submit provisions to assure that the best available control measures (BACM) for the control of $PM_{2.5}$ and $PM_{2.5}$ precursors shall be implemented no later than four years after the date the area is reclassified as a Serious area. The EPA has defined BACM in the $PM_{2.5}$ SIP Requirements Rule to mean ''any technologically and economically feasible control measure that can be implemented in whole or in part within 4 years after the date of reclassification of a Moderate $PM_{2.5}$ nonattainment area to Serious and that generally can achieve greater permanent and enforceable emissions reductions in direct $PM_{2.5}$ emissions and/or emissions of $PM_{2.5}$ plan precursors from sources in the area than can be achieved through the implementation of RACM on the same source(s). BACM includes best available control technology (BACT).'' [122]

The EPA generally considers BACM a control level that goes beyond existing RACM-level controls, for example by expanding the use of RACM controls or by requiring preventative measures instead of remediation.[123] Indeed, as implementation of BACM and BACT is required when a Moderate nonattainment area is reclassified as Serious due to its inability to attain the NAAQS through implementation of ''reasonable'' measures, it is logical that ''best'' control measures should represent a more stringent and potentially more costly level of control.[124] If RACM and RACT level controls of emissions have been insufficient to reach attainment, the CAA contemplates the implementation of more stringent controls, controls on more sources, or other adjustments to the control strategy necessary to attain the NAAQS in the area.

Consistent with longstanding guidance provided in the General Preamble Addendum, the preamble to the $PM_{2.5}$ SIP Requirements Rule discusses the following steps for determining BACM and BACT:

1. Develop a comprehensive emission inventory of the sources of $PM_{2.5}$ and $PM_{2.5}$ precursors;
2. Identify potential control measures;
3. Determine whether an available control measure or technology is technologically feasible;
4. Determine whether an available control measure or technology is economically feasible; and
5. Determine the earliest date by which a control measure or technology can be implemented in whole or in part.[125]

The EPA allows consideration of factors such as physical plant layout, energy requirements, needed infrastructure, and workforce type and habits when considering technological feasibility. For purposes of evaluating economic feasibility, the EPA allows consideration of factors such as the capital costs, operating and maintenance costs, and cost effectiveness (*i.e.,* cost per ton of pollutant reduced by a measure or technology) associated with the measure or control.[126]

Once these analyses are complete, the state must use this information to develop enforceable control measures and submit them to the EPA for evaluation as SIP provisions to meet the basic requirements of CAA section 110 and any other applicable substantive provisions of the Act. The EPA is using these steps as guidelines in the evaluation of the BACM and BACT measures and related analyses in the SJV $PM_{2.5}$ Plan.

2. Summary of State's Submission

As discussed in section IV.A of this proposed rule, Appendix B of the 2018 $PM_{2.5}$ Plan contains the planning inventories for direct $PM_{2.5}$ and all $PM_{2.5}$ precursors (NO_X, SO_X, VOC, and ammonia) for the SJV nonattainment area together with documentation to support these inventories. Each inventory includes emissions from stationary, area, on-road, and non-road emission sources, and the State specifically identifies the condensable component of direct $PM_{2.5}$ for relevant stationary and area source categories. As discussed in section IV.B of this proposed rule concerning precursors, the State's analysis indicates that the Plan should control emissions of $PM_{2.5}$ and NO_X in order to reach attainment. Accordingly, the State evaluated potential controls for those pollutants in the analysis of what is necessary to meet the BACM (including BACT) requirements.

For stationary and area sources, the District identifies the sources of direct $PM_{2.5}$ and NO_X in the SJV that are subject to District emission control measures and provides its evaluation of these regulations for compliance with BACM requirements in Appendix C of the 2018 $PM_{2.5}$ Plan. As part of its process for identifying candidate BACM and considering the technical and economic feasibility of additional control measures, the District reviewed the EPA's guidance documents on BACM, additional guidance documents on control measures for direct $PM_{2.5}$ and NO_X emission sources, and control measures implemented in other ozone and $PM_{2.5}$ nonattainment areas in California and other states.[127] Based on these analyses, the District concludes that all best available control measures for stationary and area sources are in place in the SJV for NO_X and directly emitted $PM_{2.5}$ for purposes of meeting the BACM/BACT requirement for the 2012 annual $PM_{2.5}$ NAAQS.

For mobile sources, CARB identifies the sources of direct $PM_{2.5}$ and NO_X in the SJV that are subject to the State's emission control measures and provides its evaluation of these regulations for compliance with BACM requirements in Appendix D of the 2018 $PM_{2.5}$ Plan. Appendix D describes CARB's process for determining BACM, including identification of the sources of direct $PM_{2.5}$ and NO_X in the SJV, identification of potential control measures for such sources, assessment of the stringency and feasibility of the potential control measures, and adoption and implementation of feasible control measures.[128] CARB further discusses its current mobile source control program and additional mobile source measures in the Valley State SIP Strategy. Appendix D of the 2018 $PM_{2.5}$ Plan also describes the current efforts of the eight local jurisdiction metropolitan planning organizations (MPOs) to implement cost-effective transportation control measures (TCMs) in the SJV.[129] Based on these analyses, CARB concludes that all best available control measures for mobile sources are in place in the SJV for NO_X and directly emitted $PM_{2.5}$ for purposes of meeting the BACM/BACT requirement for the 2012 annual $PM_{2.5}$ NAAQS.

[122] 40 CFR 51.1000 (definitions). In longstanding guidance, the EPA has similarly defined BACM to mean, ''among other things, the maximum degree of emissions reduction achievable for a source or source category, which is determined on a case-by-case basis considering energy, environmental, and economic impacts.'' General Preamble Addendum, 42010, 42013.

[123] 81 FR 58010, 58081 and General Preamble Addendum, 42011, 42013.

[124] Id. and General Preamble Addendum, 42009–42010.

[125] 81 FR 58010, 58083–58085.

[126] 40 CFR 51.1010(a)(3) and 81 FR 58010, 58041–58042.

[127] 2018 $PM_{2.5}$ Plan, Ch. 4, section 4.3.1.

[128] Id. at App. D, Ch. II.

[129] Id. at App. D, D–127 and D–128.

3. EPA Evaluation and Proposed Action

The first step in determining BACM is to develop a comprehensive emissions inventory of the sources of direct $PM_{2.5}$ and relevant $PM_{2.5}$ precursors that can be used with modeling to determine the effects of these sources on ambient $PM_{2.5}$ levels. Based on our review of the emission inventories provided in Appendix B of the 2018 $PM_{2.5}$ Plan and the State's and District's identification of the sources subject to control in Appendix C and Appendix D, the EPA proposes to find that the Plan appropriately identifies all sources of direct $PM_{2.5}$ and NO_X that are subject to evaluation for potential control consistent with the requirements of subpart 4 of part D, title I of the Act.

The remaining steps are to identify potential control measures for each source category, determine whether available control measures or technologies are technologically and economically feasible for implementation in the area, and determine the earliest date by which those control measures or technologies found to be feasible can be implemented, in whole or in part.[130]

We provide an evaluation of many of the District's control measures for stationary sources and area sources in section III of the EPA's ''Technical Support Document, EPA Evaluation, San Joaquin Valley Serious Area Plan for the 2012 Annual $PM_{2.5}$ NAAQS,'' December 2021 (''EPA's 2012 Annual $PM_{2.5}$ TSD'').

Mobile source categories for which CARB has primary responsibility for reducing emissions in California include most new and existing on- and non-road engines and vehicles and motor vehicle fuels. The SJV $PM_{2.5}$ Plan's BACM demonstration provides a general description of CARB's key mobile source programs and regulations and a comprehensive table listing on-road and non-road mobile source regulatory actions taken by CARB since 1985.[131]

Appendix D of the 2018 $PM_{2.5}$ Plan describes the current efforts of the eight local jurisdiction MPOs to implement cost-effective TCMs in the SJV.[132] TCMs are projects that reduce air pollutants from transportation sources by reducing vehicle use, traffic congestion, or vehicle miles traveled. The eight MPOs in the SJV currently implement TCMs as part of the Congestion Mitigation and Air Quality cost effectiveness policy adopted by the eight local jurisdiction MPOs and in the development of each Regional Transportation Plan (RTP). The Congestion Mitigation and Air Quality policy, which is included in a number of the District's prior attainment plan submissions for the ozone and $PM_{2.5}$ NAAQS, provides a standardized process for distributing 20% of the Congestion Mitigation and Air Quality funds to projects that meet a minimum cost effectiveness threshold beginning in fiscal year 2011. The MPOs revisited the minimum cost effectiveness standard during the development of their 2018 RTPs and 2019 Federal Transportation Improvement Program and concluded that they were implementing all reasonable transportation control measures.[133] Appendix D of the District's ''2016 Ozone Plan for 2008 8-Hour Ozone Standard,'' adopted June 16, 2016, contains a listing of adopted TCMs for the SJV.[134]

We have reviewed the State's and District's analysis and determination in the SJV $PM_{2.5}$ Plan that their baseline mobile, stationary, and area source control measures meet the requirements for BACM for sources of direct $PM_{2.5}$ and applicable $PM_{2.5}$ plan precursors (*i.e.,* NO_X) for purposes of the 2012 annual $PM_{2.5}$ NAAQS. In our review, we considered our evaluation of the State's and District's rules in connection with our approval of the demonstrations for BACM (including BACT) and MSM for the 2006 24-hour $PM_{2.5}$ NAAQS.[135] We conclude that the evaluation processes followed by CARB and the District in the SJV $PM_{2.5}$ Plan to identify potential BACM were generally consistent with the requirements of the $PM_{2.5}$ SIP Requirements Rule, the State's and District's evaluation of potential measures is appropriate, and the State and District have provided reasoned justifications for their rejection of potential measures based on technological or economic infeasibility. We also agree with the District's conclusion that the eight MPOs are implementing all reasonable TCMs in the SJV and propose to find that these TCMs implement BACM for transportation sources.

For the foregoing reasons, we propose to find that the SJV $PM_{2.5}$ Plan provides for the implementation of BACM for sources of direct $PM_{2.5}$ and NO_X as expeditiously as practicable in accordance with the requirements of CAA section 189(b)(1)(B), and in satisfaction of the Serious area plan requirements for the 2012 annual $PM_{2.5}$ NAAQS.

E. Nonattainment New Source Review Requirements Under CAA Section 189(e)

Section 189(e) of the CAA specifically requires that the control requirements applicable to major stationary sources of direct $PM_{2.5}$ also apply to major stationary sources of $PM_{2.5}$ precursors, except where the Administrator determines that such sources do not contribute significantly to $PM_{2.5}$ levels that exceed the standards in the area.[136] The control requirements applicable to major stationary sources of direct $PM_{2.5}$ in a Serious $PM_{2.5}$ nonattainment area include, at minimum, the requirements of a nonattainment NSR permit program meeting the requirements of CAA sections 172(c)(5) and 189(b)(3). The publication of our final action to reclassify the SJV area as Serious nonattainment for the 2012 annual $PM_{2.5}$ NAAQS established a deadline of June 27, 2023, for the State to submit nonattainment NSR SIP revisions addressing the requirements of CAA sections 189(b)(3) and 189(e) of the Act for the 2012 annual $PM_{2.5}$ NAAQS.[137]

California submitted nonattainment NSR SIP revisions to address the subpart 4 requirements for the Serious area attainment plan for SJV on November 20, 2019.[138] We will act on that submission through a separate rulemaking, as appropriate.

F. Attainment Demonstration

1. Requirements for Attainment Demonstration

Section 189(b)(1)(A) of the CAA requires that each Serious area plan include a demonstration (including air quality modeling) that the plan provides for attainment of the relevant $PM_{2.5}$ NAAQS by the applicable attainment date. The $PM_{2.5}$ SIP Requirements Rule explains that Serious area attainment plans under CAA sections 189(b) must include a demonstration (including air quality modeling) that the control

[130] 81 FR 58010, 58083–58085. The EPA's recommended steps for a BACM demonstration are substantively similar to the required steps for an MSM demonstration in 40 CFR 51.1010(b).

[131] 2018 $PM_{2.5}$ Plan, App. D, Table 17.

[132] Id. at App. D, D–127 and D–128.

[133] Id. at App. D, D–127.

[134] Id. and SJVUAPCD, ''2016 Ozone Plan for 2008 8-Hour Ozone Standard'' (adopted June 16, 2016), App. D, Attachment D, tables D–10 to D–17.

[135] 85 FR 44192. The EPA provides a more detailed evaluation of many of the District's control measures for stationary and area sources in two supporting documents: The EPA's ''Technical Support Document, EPA Evaluation of BACM/MSM, San Joaquin Valley $PM_{2.5}$ Plan for the 2006 $PM_{2.5}$ NAAQS,'' February 2020; and the EPA's ''Response to Comments Document for the EPA's Final Action on the San Joaquin Valley Serious Area Plan for the 2006 $PM_{2.5}$ NAAQS,'' June 2020.

[136] General Preamble, 13539 and 13541–13542.

[137] 86 FR 67343, 67347.

[138] Letter dated November 15, 2019, from Richard W. Corey, Executive Officer, CARB, to Michael Stoker, Regional Administrator, EPA Region IX.

strategy provides for attainment of the $PM_{2.5}$ NAAQS as expeditiously as practicable.[139] For purposes of determining the attainment date that is as expeditious as practicable, the state must conduct future year modeling that takes into account emissions growth, known controls (including any controls determined to be RACM, RACT, and additional reasonable measures, and BACM, BACT, and additional feasible measures), and any other emissions controls that are needed for expeditious attainment of the NAAQS.[140] The regulatory requirements for Serious area plans are codified at 40 CFR 51.1010 (control strategy requirements) and 40 CFR 51.1011(b) (attainment demonstration and modeling requirements).

2. Summary of State's Submission

The SJV $PM_{2.5}$ Plan includes a modeled demonstration projecting attainment of the 2012 annual $PM_{2.5}$ NAAQS in the SJV by December 31, 2025, based on emission reductions from implementation of baseline control measures and the development, adoption, and implementation of additional control measures to meet specific enforceable commitments. We have summarized the State's air quality modeling for demonstrating attainment in section IV.C.2 of this proposed rule. Table 3 shows the 2013 base year and 2025 projected future year annual $PM_{2.5}$ design values at monitoring sites in the SJV. As recommended by the EPA's guidance, the 2013 base year design value for modeling purposes is a weighted average of three monitored design values (for 2010–2012, 2011–2013, and 2012–2014), to minimize the influence of year-to-year variability. The highest 2025 projected design value is 12.0 μg/m³ at the Bakersfield-Planz and Madera monitoring sites, consistent with demonstrating attainment of the 12.0 μg/m³ level of the 2012 annual $PM_{2.5}$ NAAQS.[141]

TABLE 3—BASE YEAR AND PROJECTED ATTAINMENT YEAR ANNUAL $PM_{2.5}$ DESIGN VALUES AT MONITORING SITES IN THE SAN JOAQUIN VALLEY

Monitoring site	2013 Base design value (μg/m³)	2025 Projected design value (μg/m³)
Bakersfield-Planz	17.2	12.0
Madera	16.9	12.0
Hanford	16.5	10.5
Visalia	16.2	11.5
Clovis	16.1	11.4
Bakersfield-California	16.0	11.0
Fresno-Garland	15.0	10.4
Turlock	14.9	11.1
Fresno-Hamilton & Winery	14.2	10.0
Stockton	13.1	10.6
Merced-S. Coffee	13.1	9.6
Modesto	13.0	9.9
Merced-M Street	11.0	8.6
Manteca	10.1	8.0
Tranquility	7.7	5.5

Source: 2018 $PM_{2.5}$ Plan, Table 7–3.

The SJV $PM_{2.5}$ Plan's control strategy to reduce emissions from sources of NO_X and direct $PM_{2.5}$ is presented in Chapter 4 (''Attainment Strategy for $PM_{2.5}$'')[142] and related supporting information in the Plan's control strategy appendices, including Appendix C (''Stationary Source Control Measure Analyses''), Appendix D (''Mobile Source Control Measures Analyses''), and Appendix E (''Incentive-Based Strategy''). Most of the projected emission reductions are achieved by baseline measures—*i.e.,* the combination of State and District measures adopted prior to the State's and District's adoption of the Plan—that will achieve ongoing emission reductions from the 2013 base year to the 2025 projected attainment year.

The remainder of the emission reductions are to be achieved by additional measures to meet enforceable commitments, including potential regulatory and incentive-based measures and, as necessary, substitute measures.[143] In the Valley State SIP Strategy and the 2018 $PM_{2.5}$ Plan, CARB and the District, respectively, included commitments to take action on specific measures by specific years or to develop substitute measures (referred to as ''control measure commitments'') and to achieve specified amounts of NO_X and direct $PM_{2.5}$ emission reductions by certain dates (referred to as ''aggregate tonnage commitments'').[144] We refer to these complementary commitments herein as ''aggregate commitments.''

[139] 40 CFR 51.1011(b)(1); 81 FR 58010, 58087–58088.

[140] 40 CFR 51.1010(a); 81 FR 58010, 58089–58090.

[141] As discussed in section IV.B.3.a of this proposed rule, the State notes that Madera concentrations are biased high. 2018 $PM_{2.5}$ Plan, App. G, 14.

[142] Consistent with the State and District's determination that ammonia, SO_X, and VOC do not contribute significantly to $PM_{2.5}$ levels exceeding the NAAQS in the SJV, the Plan's control strategy focuses on reductions in emissions of direct $PM_{2.5}$ and NO_X. CARB Staff Report, 12. Nonetheless, the Plan projects the following annual average emission reductions from the 2013 base year to 2025: 0.5 tpd reductions in SO_X (5.9%), 30.0 tpd reductions in VOC (9.3%), and 4.9 tpd reductions in ammonia (1.5%). 2018 $PM_{2.5}$ Plan, App. B, tables B–3, B–4, and B–5.

[143] In this proposed rule, the term ''substitute measures'' means additional control measures that were not identified in CARB and the District's original control measure commitments in adopting the Valley State SIP Strategy and the 2018 $PM_{2.5}$ Plan, respectively. The ''substitute'' aspect primarily relates to emission reductions (*i.e.,* providing emission reductions where any adopted measure achieves less emission reductions than originally estimated, and/or providing emission reductions in lieu of any originally planned measure that is not adopted). They are also sometimes referred to as ''alternative measures'' in the SJV $PM_{2.5}$ Plan and adopting resolutions.

[144] CARB Resolution 18–49 and SJVUAPCD Governing Board Resolution 18–11–16, paragraph 6.

CARB's control measure commitments include 12 regulatory measures and 3 incentive-based measures with implementation anticipated to start no later than 2024.[145] The District's control measure commitments include nine regulatory measures and three incentive-based measures with implementation anticipated to start no later than 2024.[146] We provide further detail on CARB and the District's control measure commitments both in sections IV.F.3.b and IV.F.3.c of this proposed rule and in section IV.A of the EPA's 2012 Annual $PM_{2.5}$ TSD.

CARB's aggregate tonnage commitments are ''to achieve the aggregate emissions reductions outlined in the Valley State SIP Strategy of 32 tpd of NO_X and 0.9 tpd of $PM_{2.5}$ emissions reductions in the San Joaquin Valley by 2024 and 2025.'' [147] The Valley State SIP Strategy explains that CARB's overall commitment is to ''achieve the total emission reductions necessary to attain the federal air quality standards, reflecting the combined reductions from the existing control strategy and new measures'' and that ''if a particular measure does not get its expected emissions reductions, the State is still committed to achieving the total aggregate emission reductions.'' [148]

The District's aggregate tonnage commitments are to ''achieve the aggregate emissions reductions of 1.88 tpd of NO_X and 1.3 tpd of $PM_{2.5}$ by 2024/2025'' through adoption and implementation of these measures or, if the total emission reductions from these rules or measures are less than these amounts, ''to adopt, submit, and implement substitute rules and measures that achieve equivalent reductions in emissions of direct $PM_{2.5}$ or $PM_{2.5}$ precursors'' in the same implementation timeframes.[149]

CARB and the District's aggregate tonnage commitments sum to 33.88 tpd NO_X and 2.2 tpd direct $PM_{2.5}$ emission reductions. We provide further detail on CARB and the District's aggregate tonnage commitments in sections IV.F.3.b and IV.F.3.d of this proposed rule and in section IV.B of the EPA's 2012 Annual $PM_{2.5}$ TSD.

We note that the SJV $PM_{2.5}$ Plan generally relies on annual average emission inventory and control strategy estimates, consistent with the annual average form of the 2012 annual $PM_{2.5}$ NAAQS. Table 4 provides a summary of the 2013 base year emissions and the reductions from baseline measures, additional State measures, and additional District measures that the Plan projects will result in attainment of the 2012 annual $PM_{2.5}$ NAAQS in the SJV by December 31, 2025.[150]

TABLE 4—SUMMARY OF THE SJV $PM_{2.5}$ PLAN'S ANNUAL AVERAGE EMISSION REDUCTIONS TO ATTAIN THE 2012 ANNUAL $PM_{2.5}$ NAAQS BY DECEMBER 31, 2025

		NO_X (tpd)	% of 2013 base year NO_X emissions	Direct $PM_{2.5}$ (tpd)	% of 2013-base year $PM_{2.5}$ emissions
A	2013 Base Year Emissions	317.2		62.5	
B	Baseline Measure Emission Reductions (2013–2025)	173.5	54.7	4.2	6.7
C	Additional CARB Measures	32	10.1	0.9	1.4
D	Additional District Measures	1.88	0.6	1.3	2.1
E	Total 2013–2025 Emission Reductions (B+C+D)	207.38	65.4	6.4	10.2

Source: 2018 $PM_{2.5}$ Plan, Appendix B, tables B–1 and B–2, and Ch. 4, tables 4–3 and 4–7.

3. EPA Evaluation and Proposed Action

The EPA must make several findings in order to approve the modeled attainment demonstration in an attainment plan SIP submission. First, we must find that the attainment demonstration's technical bases, including the emissions inventories and air quality modeling, are adequate. As discussed in section IV.A of this proposed rule, the EPA proposes to approve the emissions inventories on which the State based the SJV $PM_{2.5}$ Plan's attainment demonstration and related provisions. Furthermore, as discussed in section IV.C of this proposed rule, the EPA has evaluated the State's choice of model and the extensive discussion in the Modeling Protocol about modeling procedures, tests, and performance analyses. We consider the analyses consistent with the EPA's guidance on modeling for $PM_{2.5}$ attainment planning purposes. Based on these reviews, we propose to find that the modeling in the Plan is adequate for the purposes of supporting the RFP demonstration and demonstration of attainment by 2025, and thus propose to approve the air quality modeling. For further detail, see the EPA's February 2020 Modeling TSD.

Second, we must find that the attainment plan SIP submission provides for expeditious attainment through the timely implementation of the control strategy, including RACM, BACM, and any other emission controls that are needed for expeditious attainment. In the EPA's final rule on the SJV Moderate area plan for the 2012 annual $PM_{2.5}$ NAAQS, the EPA approved the State's demonstration of RACM (including RACT) and additional reasonable measures for all sources of direct $PM_{2.5}$ and NO_X, under CAA section 189(a)(1)(C) and 40 CFR 51.1009 for purposes of the 2012 annual $PM_{2.5}$ NAAQS.[151] As discussed in section IV.C of this proposed rule, the EPA now proposes to approve the SJV $PM_{2.5}$ Plan's demonstration of BACM (including BACT) under CAA section 189(b)(1)(B).

Third, the EPA must find that the emissions reductions that are relied on

[145] Valley State SIP Strategy, Table 7. The schedule of proposed SIP measures in Table 7 includes two additional CARB measures: The second phase of the Advanced Clean Cars Program (''ACC 2'') and the ''Cleaner In-Use Agricultural Equipment'' measures. However, these measures are not scheduled for implementation until 2026 and 2030, respectively, which is after the January 1, 2025 implementation deadline under 40 CFR 51.1011(b)(5) for control measures necessary for attainment by December 31, 2025. Therefore, we are not reviewing these measures as part of the control strategy to attain the 2012 annual $PM_{2.5}$ NAAQS in the SJV.

[146] 2018 $PM_{2.5}$ Plan, Ch. 4, tables 4–3 and 4–5.

[147] CARB Resolution 18–49.

[148] 2018 $PM_{2.5}$ Plan, Ch. 4, 4–29.

[149] SJVUAPCD Governing Board Resolution 18–11–16, paragraph 6.

[150] Emission reductions from baseline measures are calculated as the sum of all stationary, area, and mobile source emission reductions from 2013 to 2025 in App. B of the 2018 $PM_{2.5}$ Plan.

[151] Our approval of the State's demonstration of RACM and additional reasonable measures was informed by the State's control stringency demonstrations in both the Moderate area plan (2016 $PM_{2.5}$ Plan) and the Serious area plan (2018 $PM_{2.5}$ Plan) for the 2012 annual $PM_{2.5}$ NAAQS in the SJV. 86 FR 49100, 49115–49116.

for attainment in the SIP submission are creditable. As discussed in subsections IV.F.3.a through IV.F.3.e of this proposed rule, the SJV $PM_{2.5}$ Plan relies principally on already adopted and approved rules to achieve the emissions reductions needed to attain the 2012 annual $PM_{2.5}$ NAAQS in the SJV by December 31, 2025. The balance of the reductions that the State has modeled to achieve attainment by this date is currently represented by enforceable commitments that account for 13.8% of the NO_X and 8.0% of the direct $PM_{2.5}$ emissions reductions needed for attainment.

The EPA may accept enforceable commitments in lieu of adopted control measures in attainment demonstrations when the circumstances warrant it and the commitments meet three criteria the EPA has established for this purpose. The EPA is proposing to find that circumstances here warrant the consideration of enforceable commitments and that the three criteria are met: (1) The commitments constitute a limited portion of the required emissions reductions, (2) both the State and the District have demonstrated their capability to meet their commitments, and (3) the commitments are for an appropriate timeframe. We therefore propose to approve the State's reliance on these enforceable commitments in its attainment demonstration.

Based on these evaluations, we propose to determine that the SJV $PM_{2.5}$ Plan provides for attainment of the 2012 annual $PM_{2.5}$ NAAQS by December 31, 2025, consistent with the requirements of CAA sections 189(b)(1)(A). We present the basis for this proposed determination in subsections IV.F.3.a through IV.F.3.e of this proposal and provide further detail of our evaluation of baseline measures and the additional measures and aggregate commitments in sections II and IV, respectively, of the EPA's 2012 Annual $PM_{2.5}$ TSD. In the following subsections we first address the baseline measures that are in effect in the SJV; we then describe the control measure and aggregate tonnage commitments submitted with the Plan; next, we evaluate progress that the State and District have made since submission of the Plan, on both the control measures and the aggregate tonnage commitments; finally we apply the three-factor test for reliance on enforceable commitments to demonstrate attainment.

(a) Baseline Measures

Baseline measures will provide the majority of emissions reductions needed to attain the 2012 annual $PM_{2.5}$ NAAQS in the SJV, amounting to approximately 83.7% of the total NO_X emission reductions and 65.6% of the total direct $PM_{2.5}$ emission reductions necessary to attain.[152]

In the 2018 $PM_{2.5}$ Plan, the State explains that mobile sources emit over 85% of the NO_X in the SJV and that CARB has adopted and amended regulations to reduce public exposure to diesel particulate matter, which includes direct $PM_{2.5}$, and NO_X, from ''fuel sources, freight transport sources like heavy-duty diesel trucks, transportation sources like passenger cars and buses, and non-road sources like large construction equipment.'' [153]

Given the need for substantial emissions reductions from mobile and area sources to meet the NAAQS in California nonattainment areas, the State of California has developed stringent control measures for on-road and non-road mobile sources and the fuels that power them. California has unique authority under CAA section 209 (subject to a waiver by the EPA) to adopt and implement new emissions standards for many categories of on-road vehicles and engines and new and in-use non-road vehicles and engines. The EPA has approved multiple mobile source regulations for which waivers or authorizations have been issued as revisions to the California SIP.[154]

CARB's mobile source program extends beyond regulations that are subject to the waiver or authorization process set forth in CAA section 209 to include standards and other requirements to control emissions from in-use heavy-duty trucks and buses, gasoline and diesel fuel specifications, and many other types of mobile sources. Generally, these regulations have also been submitted and approved as revisions to the California SIP.[155]

As to stationary sources, in the 2018 $PM_{2.5}$ Plan, the State explains that stringent regulations adopted for prior attainment plans continue to reduce emissions of NO_X and direct $PM_{2.5}$.[156] Specifically, Table 4–1 of the 2018 $PM_{2.5}$ Plan (''District Rules Reducing PM and NO_X Emissions in the Valley'') identifies 33 District measures that limit NO_X and direct $PM_{2.5}$ emissions.[157] The EPA has approved each of the identified measures into the California SIP,[158] with two exceptions.

First, the District amended Rule 4905 (''Natural Gas-fired, Fan-type, Residential Central Furnaces'') on June 21, 2018, to extend the period during which manufacturers may pay emission fees in lieu of meeting the rule's NO_X emission limits.[159] CARB submitted the amended rule to the EPA on November 21, 2018. However, the District amended Rule 4905 once more on October 15, 2020, to further extend the period during which manufacturers of weatherized furnaces may pay emission fees in lieu of meeting the rule's NO_X emission limits.[160] CARB submitted the rule as amended October 15, 2020, to the EPA on December 30, 2020, and simultaneously withdrew the rule as amended June 21, 2018.[161] The EPA has not yet proposed any action on this submission.

The EPA approved a prior version of Rule 4905 into the California SIP on March 29, 2016.[162] As part of that rulemaking, the EPA noted that because of the option in Rule 4905 to pay mitigation fees in lieu of compliance with emission limits, emission reductions associated with the rule's emission limits would not be creditable in any attainment plan without additional documentation.[163] Until the District submits the necessary documentation to credit emission reductions achieved by Rule 4905

[152] The EPA calculated these percentages as follows: Annual average baseline NO_X reductions from 2013 to 2025 are 173.5 tpd of 207.38 tpd modeled to result in attainment (83.7%) and annual average baseline direct $PM_{2.5}$ reductions are 4.1 tpd of 6.3 tpd modeled to result in attainment (65.1%). 2018 $PM_{2.5}$ Plan, Ch. 4 and App. B.

[153] 2018 $PM_{2.5}$ Plan, Ch. 4, 4–9 and Valley State SIP Strategy, 4. For CARB's analysis of its mobile source measures for BACM and MSM, see 2018 $PM_{2.5}$ Plan, App. D, including analyses for on-road light-duty vehicles and fuels (starting page D–17), on-road heavy-duty vehicles and fuels (starting page D–35), and non-road sources (starting page D–64).

[154] See, *e.g.,* 81 FR 39424, 82 FR 14447, and 83 FR 23232.

[155] See, *e.g.,* the EPA's approval of standards and other requirements to control emissions from in-use heavy-duty diesel trucks, 77 FR 20308 (April 4, 2012), and revisions to the California on-road reformulated gasoline and diesel fuel regulations, 75 FR 26653 (May 12, 2010).

[156] 2018 $PM_{2.5}$ Plan, Ch. 4, 4–3. For the District's analysis of its stationary source measures for BACM and MSM, see 2018 $PM_{2.5}$ Plan, App. C.

[157] Id. at Ch. 4, Table 4–1.

[158] See EPA Region IX's website for information on District control measures that have been approved into the California SIP, available at: *https://www.epa.gov/sips-ca/epa-approved-san-joaquin-valley-unified-air-district-regulations-california-sip.*

[159] SJVUAPCD, Final Draft Staff Report, ''Proposed Amendments to Rule 4905 (Natural Gas-fired, Fan-type Central Furnaces),'' 2.

[160] SJVUAPCD, ''Item Number X: Adopt Proposed Amendments to Rule 4905 (Natural Gas-Fired, Fan-Type Furnaces),'' October 15, 2020, 3, including Final Draft Staff Report, ''Proposed Amendments to Rule 4905 (Natural Gas-Fired, Fan-Type Furnaces).''

[161] Letter dated December 28, 2020, from Richard W. Corey, Executive Officer, CARB, to John Busterud, Regional Administrator, EPA Region IX.

[162] 81 FR 17390 (March 29, 2016) (approving Rule 4905 as amended January 22, 2015).

[163] EPA Region IX, ''Technical Support Document for EPA's Proposed Rulemaking for the California State Implementation Plan (SIP), San Joaquin Valley Unified Air Pollution Control District's Rule 4905, Natural Gas-Fired, Fan-Type Central Furnaces,'' October 5, 2015, n. 8.

toward an attainment control strategy, this rule is not creditable for SIP purposes. The 2018 $PM_{2.5}$ Plan indicates that the District attributed annual average emission reductions of 0.31 tpd NO_X between 2013 and 2025 to Rule 4905.[164] These emission reductions would not materially affect the attainment demonstration in the SJV $PM_{2.5}$ Plan.

Second, the 2018 $PM_{2.5}$ Plan lists Rule 4203 (''Particulate Matter Emissions from Incineration of Combustible Refuse'') as a baseline measure. This rule has not been approved into the California SIP.[165] Appendix C of the 2018 $PM_{2.5}$ Plan indicates, however, that the emissions inventory for incineration of combustible refuse is 0.00 tpd of NO_X and 0.00 tpd direct $PM_{2.5}$ from 2013 through 2025.[166] Thus, although the District included this rule as a baseline measure, there are no meaningful reductions associated with this rule that would affect the attainment demonstration in the SJV $PM_{2.5}$ Plan.

In sum, although Table 4–1 of the 2018 $PM_{2.5}$ Plan identifies two baseline measures that are not creditable for SIP purposes at this time, we conclude that the total emission reductions attributed to these two measures in the future baseline inventories would not materially affect the attainment demonstration in the Plan.

(b) Additional Measures and Aggregate Commitments

The SJV $PM_{2.5}$ Plan identifies a series of additional CARB and District commitments to achieve emission reductions through additional control measures beyond baseline measures that will contribute to expeditious attainment of the 2012 annual $PM_{2.5}$ NAAQS. As discussed in section IV.F.2 of this proposed rule, for mobile sources, CARB's commitment identifies a list of 12 State regulatory measures and 3 incentive-based measures that CARB has committed to propose to its Board for consideration by specific years.[167] For stationary sources, the District's commitment identifies a list of nine regulatory measures and three incentive-based measures that the District has committed to propose to its Board for consideration by specific years.[168] The Plan contains CARB and the District's estimates of the emission reductions that would be achieved by each of these additional measures, if adopted.[169]

CARB's commitments are contained in CARB Resolution 18–49 (October 25, 2018) and the Valley State SIP Strategy and consist of two parts: A control measure commitment and a tonnage commitment. First, CARB has committed to ''begin the measure's public process and bring to the Board for consideration the list of proposed SIP measures outlined in the *Valley State SIP Strategy* and included in Attachment A, according to the schedule set forth.'' [170] By email dated November 12, 2019, CARB confirmed that it intended to begin the public process on each measure by discussing the proposed regulation or program at a public meeting (workshop, working group, or Board hearing) or in a publicly-released document and to then propose the regulation or program to its Board.[171] Second, CARB has committed ''to achieve the aggregate emissions reductions outlined in the *Valley State SIP Strategy* of 32 tpd of NO_X and 0.9 tpd of $PM_{2.5}$ emissions reductions in the San Joaquin Valley by 2024 and 2025.'' [172] The Valley State SIP Strategy explains that CARB's overall commitment is to ''achieve the total emission reductions necessary to attain the federal air quality standards, reflecting the combined reductions from the existing control strategy and new measures'' and that ''if a particular measure does not get its expected emissions reductions, the State is still committed to achieving the total aggregate emission reductions.'' [173]

The District's commitments are contained in SJVUAPCD Governing Board Resolution 18–11–16 (November 15, 2018) and Chapter 4 of the 2018 $PM_{2.5}$ Plan and similarly consist of two parts: A control measure commitment and a tonnage commitment. First, the District has committed to ''take action on the rules and measures committed to in Chapter 4 of the Plan by the dates specified therein, and to submit these rules and measures, as appropriate, to CARB within 30 days of adoption for transmittal to EPA as a revision to the [SIP].'' [174] By email dated November 12, 2019, the District confirmed that it intended to take action on the listed rules and measures by beginning the public process on each measure, *i.e.,* discussing the proposed regulation or program at a public meeting, including a workshop, working group, or Board hearing, or in a publicly-released document, and then proposing the rule or measure to the SJVUAPCD Governing Board.[175] Second, the District has committed to ''achieve the aggregate emissions reductions of 1.88 tpd of NO_X and 1.3 tpd of $PM_{2.5}$ by 2024/2025'' through adoption and implementation of these measures or, if the total emission reductions from these rules or measures are less than these amounts, ''to adopt, submit, and implement substitute rules and measures that achieve equivalent reductions in emissions of direct $PM_{2.5}$ or $PM_{2.5}$ precursors'' in the same implementation timeframes.[176]

(c) Progress on Control Measure Commitments

In October 2021, CARB and the District provided the ''Progress Report and Technical Submittal for the 2012 $PM_{2.5}$ Standard San Joaquin Valley'' (2021 Progress Report) to describe their progress to date in developing and adopting the additional measures identified in their control measure commitments. The 2021 Progress Report provides status updates on the substance of each measure and the timing of board consideration for both adopted and remaining control measure commitments.[177] It also provides a side-by-side comparison of the original emission reduction estimates in the SJV $PM_{2.5}$ Plan for each control measure commitment and updated emission reduction estimates for each based on technical analyses for adopted measures and draft measures and/or

[164] 2018 $PM_{2.5}$ Plan, App. C, C–290.

[165] The EPA does not have any pending SIP submission for Rule 4203.

[166] 2018 $PM_{2.5}$ Plan, App. C, C–46.

[167] CARB Resolution 18–49, Attachment A and Valley State SIP Strategy, Table 7 (''State Measures and Schedule for the San Joaquin Valley'').

[168] SJVUAPCD Governing Board Resolution 18–11–16 and 2018 $PM_{2.5}$ Plan, Table 4–4 (''Proposed Regulatory Measures'') and Table 4–5 (''Proposed Incentive-Based Measures'').

[169] 2018 $PM_{2.5}$ Plan, Ch. 4, Table 4–3 (''Emission Reductions from District Measures'') and Table 4–9 (''San Joaquin Valley Expected Emission Reductions from State Measures'') and Valley State SIP Strategy, Table 8 (''San Joaquin Valley Expected Emission Reductions from State Measures'').

[170] CARB Resolution 18–49, 5.

[171] Email dated November 12, 2019, from Sylvia Vanderspek, CARB to Anita Lee, EPA Region IX, ''RE: SJV $PM_{2.5}$ information'' (attaching ''Valley State SIP Strategy Progress'') and CARB Staff Report, 14.

[172] CARB Resolution 18–49, 5.

[173] Valley State SIP Strategy, 7.

[174] SJVUAPCD Governing Board Resolution 18–11–16, 10–11.

[175] Email dated November 12, 2019, from Jon Klassen, SJVUAPCD to Wienke Tax, EPA Region IX, ''RE: follow up on aggregate commitments in SJV $PM_{2.5}$ plan'' (attaching ''District Progress in Implementing Commitments with 2018 $PM_{2.5}$ Plan'').

[176] SJVUAPCD Governing Board Resolution 18–11–16, 10–11.

[177] ''Progress Report and Technical Submittal for the 2012 $PM_{2.5}$ Standard San Joaquin Valley,'' October 19, 2021. Transmitted to the EPA by letter dated October 20, 2021, from Richard W. Corey, Executive Officer, CARB, to Deborah Jordan, Acting Regional Administrator, EPA Region IX. See sections of 2021 Progress Report entitled ''Progress in Implementing District Measures'' and ''Progress in Implementing CARB Measures.''

documentation in development for forthcoming regulations.[178]

Together, as of December 2021, CARB and the District together have adopted 18 measures of the 27 control measure commitments in the SJV $PM_{2.5}$ Plan and have begun the public process on 5 of the remaining control measure commitments. For CARB's portion, CARB has adopted 10 of the 15 measures in its commitment (including one incentive-based measure) and begun the public process on 3 of its remaining 5 measures. The adopted measures include, for example, the Heavy-Duty Vehicle Inspection and Maintenance Program (''Heavy-Duty I/M''), the California Heavy-Duty Low-NO_X Engine Standard, the Small Off-Road Engines (SORE) regulation, and the Accelerated Turnover of Agricultural Equipment Incentive Projects (''Agricultural Equipment Incentive Measure''). For the District's portion of the control measure commitments, the District has adopted 8 of the 12 measures in its commitment (including one incentive-based measure) and begun the public process on two of the remaining four measures. The adopted measures include, for example, amendments to Rule 4311 (''Flares''), Rule 4702 (''Internal Combustion Engines''), and Rule 4901 (''Woodburning Fireplaces and Wood Burning Heaters'') (Hot-spot strategy), and the Residential Wood Burning Devices Incentive Projects measure.

Accordingly, the EPA considers that, although CARB and the District have not met the commitment deadlines for several measures, as discussed further in this proposed rule, they have nonetheless made substantial progress in developing and adopting the regulatory measures listed in their respective control measure commitments. We provide further detail on CARB and the District's control measure commitments in section IV.A of the EPA's 2012 Annual $PM_{2.5}$ TSD (including tables IV–A and IV–B regarding CARB and the District's control measure commitments, respectively).

Regarding the remaining nine measures not yet proposed for board consideration, we note that one measure, Rule 4550 (''Conservation Management Practices''), has an action year of 2022 in the 2018 $PM_{2.5}$ Plan (*i.e.,* it is not yet due for board consideration) and that four regulatory measures and four incentive-based measures are overdue.

The four overdue regulatory measures are: The Zero-Emission Airport Ground Support Equipment measure; the Zero-Emission Off-Road Forklift Regulation Phase 1 measure; the Low-emission Diesel Fuel Requirement; and Rule 4692 (''Commercial Under-fired Charbroiling (Hot-spot Strategy)''). While they have not proposed these measures to their respective boards, CARB and the District timely began the public process on each of the four measures. CARB anticipates board consideration of the diesel fuel measures in 2022 and the forklift measure as early as 2022 and continues to develop the airport ground support equipment measure. The District adopted the ''Commercial Underfired Charbroiling Emission Reduction Strategy'' on December 17, 2020, and continues to evaluate potential amendments to Rule 4692 in the near future.[179]

The four overdue incentive-based control measures are for the Accelerated Turnover of Trucks and Buses Incentive Projects, the Accelerated Turnover of Off-road Equipment Incentive Projects, the Agricultural Operation Internal Combustion Engines Incentive Projects, and the Commercial Under-fired Charbroiling Incentive Projects. CARB and the District continue to invest in reducing emissions from these sources, as well as other incentive programs not named among the 27 control measure commitments, such as those for nut harvesting and landscape maintenance equipment.[180] However, while CARB and the District have discussed the proposed programs at certain board hearings,[181] the EPA is not aware that CARB or the District have started public process for the four incentive-based control measure commitments as enforceable measures to be submitted for inclusion as control measures in the California SIP.

Notwithstanding being overdue in presenting these incentive-based measures for board consideration, CARB and the District state that they continue to assess and/or prepare the formal documentation for the emission reductions from such incentive-based measures that could be applied towards the aggregate tonnage commitments.[182] For heavy-duty trucks and off-road equipment, CARB acknowledges that many of the project lives do not span the attainment year[183] and, thus, while these projects accelerate emission reductions and benefit communities in the SJV, the projects that qualify for SIP credit may be limited for the purposes of the 2012 annual $PM_{2.5}$ NAAQS Serious area attainment demonstration. Overall, the EPA anticipates that emission reductions from such projects that qualify for SIP credit (''SIP-creditable emission reductions'') may be smaller than originally anticipated in the SJV $PM_{2.5}$ Plan.

CARB and the District point to certain measures that they anticipate will provide more emission reductions than the original emission reduction estimates (*e.g.,* larger emission reductions from Heavy-Duty I/M due to new 2019 state law requirements and new roadside emissions monitoring) and the addition of the two substitute measures (the Agricultural Burning Phase-out Measure (adopted) and the In-Use Locomotive Measure (anticipated for CARB board consideration in 2022)) as compensating for incentive-based measures that may result in less emission reductions than originally projected.[184] In its annual update to the Board on September 23, 2021, CARB staff explained that, in light of the progress to-date on committed-to regulatory measures and these two substitute measures, fewer incentive-based emission reductions would be needed to demonstrate attainment of the 2012 annual $PM_{2.5}$ NAAQS.[185] We further discuss the role of adopted measures, measures not yet proposed for board consideration (including incentive-based measures), and the substitute measures in the following section of this proposed rule.

[178] 2021 Progress Report, tables 2 and 3.

[179] Id. at 8–9, 20–22, and tables 2 and 3.

[180] CARB, ''Long-Term Heavy-Duty Investment Strategy, Including Fiscal Year 2020–21 Three-Year Recommendations for Low Carbon Transportation Investments,'' (App. D to CARB's ''Proposed Fiscal Year 2021–22 Funding Plan for Clean Transportation Incentives''), release date October 8, 2021; and SJVUAPCD, ''Comprehensive Annual Financial Report, Fiscal Year Ended June 30, 2020,'' release date December 23, 2020. See also, 2021 Progress Report, 3 and 15.

[181] For example, CARB staff discussed the Accelerated Turnover of Trucks and Buses Incentive Measure at its annual 2020 update to the CARB Board. CARB presentation, ''Update on the 2018 $PM_{2.5}$ SIP for the San Joaquin Valley,'' October 22, 2020. District staff discussed and adopted an emission reductions strategy for commercial under-fired charbroiling, including incentives, in December 2020. SJVUAPCD, ''Item Number 11: Adopt Proposed Commercial Under-Fired Charbroiling Emission Reduction Strategy,'' December 17, 2020.

[182] 2021 Progress Report, 15 and 24.

[183] Id. at 24 and 32. Generally, mobile source incentive projects implemented under the Carl Moyer program are under contract only during the ''project life'' and may not be credited with SIP emission reductions after the project life ends. EPA Region IX ''Technical Support Document for EPA's Rulemaking for the California State Implementation Plan California Air Resources Board Resolution 19–26 San Joaquin Valley Agricultural Equipment Incentive Measure,'' February 2020, 12–13.

[184] 2021 Progress Report, 30–31.

[185] CARB, ''Valley $PM_{2.5}$ Implementation Update and SIP Amendment,'' September 23, 2021, slides 22–25. Slide 25 illustrates a large decrease in the expected funding need from approximately $5 billion over 2018–2025 to approximately $1 billion over 2021–2025.

(d) Progress on Aggregate Tonnage Commitments

As described in section IV.F.2 of this proposed rule, to attain the 2012 annual $PM_{2.5}$ NAAQS in the SJV, CARB committed to achieve 32 tpd of NO_X and 0.9 tpd of $PM_{2.5}$ emissions reductions, and the District committed to achieve 1.88 tpd of NO_X and 1.3 tpd of $PM_{2.5}$ emissions reductions by 2025. These aggregate tonnage commitments sum to 33.88 tpd NO_X and 2.2 tpd direct $PM_{2.5}$.

As described in sections IV.F.3.b and IV.F.3.c of this proposed rule, CARB and the District have committed to achieve these reductions via the 27 control measure commitments, or such other substitute measures as may be necessary, to achieve the aggregate tonnage commitments for NO_X and direct $PM_{2.5}$. Because the State's efforts are ongoing, different control measures are at different stages of rule development, rule adoption, submission to the EPA, and EPA evaluation and rulemaking. For the purpose of our analysis of the State's progress toward achieving its aggregate tonnage commitments, we propose to credit reductions from rules that the EPA has approved into the SIP, or that EPA has proposed for approval into the SIP at the time of this notice. We begin by explaining these measures and summing the total reductions from such measures that can be credited to CARB and the District's aggregate commitments. For many remaining measures, although reductions are not formally SIP credited at this time, CARB and the District have made substantial progress toward achieving SIP approval, or otherwise advanced their analysis of the reductions they are likely to achieve in certain areas since the adoption of the Plan. Much of this progress is summarized in the 2021 Progress Report. After detailing the creditable emission reductions achieved in approved rules and rules proposed for approval, we next address the State's progress on emission reductions from its remaining rule development efforts.

Of the 18 measures adopted to date, as well as the adoption of an important substitute measure (the Agricultural Burning Phase-out Measure), the State has submitted 9 measures as revisions to the California SIP as of November 2021. The EPA has proposed or finalized action on four of these submitted measures, including three with large associated emission reductions of direct $PM_{2.5}$ and/or NO_X in the SJV, as follows.[186]

First, on July 22, 2020, the EPA published its final approval of the District's 2019 amendment to Rule 4901 [187] and concurrently credited this measure with annual average emission reductions of 0.2 tpd direct $PM_{2.5}$ towards the District's $PM_{2.5}$ tonnage commitment for 2024.[188] As described in the EPA's March 27, 2020 proposed rule, this amount of SIP credit corresponded to a 75% compliance rate (referred to as a ''rule effectiveness rate''), consistent with the EPA's guidance on wood burning curtailment programs,[189] rather than a higher 100% rule effectiveness rate used in the District's original calculations.[190] In the 2021 Progress Report, the State notes this conclusion in the EPA's July 22, 2020 final rule approving this measure into the SIP and now estimates emission reductions of 0.2 tpd direct $PM_{2.5}$ from this measure.[191] Consistent with the EPA's July 22, 2020 final rule, we propose to credit this measure with annual average emission reductions of 0.2 tpd direct $PM_{2.5}$ for 2025 (*i.e.,* to subtract 0.2 tpd from the reductions of direct $PM_{2.5}$ emissions that the District is required to achieve with its $PM_{2.5}$ tonnage commitment).

Second, on March 24, 2020, the EPA published its proposal to approve the Agricultural Equipment Incentive Measure into the California SIP,[192] including projects funded through the Carl Moyer Memorial Air Quality Standards Attainment Program (''Carl Moyer''), Funding Agricultural Replacement Measures for Emission Reductions (FARMER), and Natural Resources Conservation Service (NRCS) programs. The measure includes commitments by CARB to monitor, assess, and report on emission reductions, and to achieve emission reductions of 5.1 tpd NO_X and 0.3 tpd direct $PM_{2.5}$ from the 2025 baseline inventory in the 2018 $PM_{2.5}$ Plan by December 31, 2024.[193] The EPA finalized a partial approval of this measure on December 16, 2021, wherein the EPA credited 4.83 tpd NO_X and 0.24 tpd direct $PM_{2.5}$ towards CARB's tonnage commitments for 2024 (for attaining the 2006 24-hour $PM_{2.5}$ NAAQS), and calculated 4.46 tpd NO_X and 0.26 tpd direct $PM_{2.5}$ for 2025 (for attaining the 2012 annual $PM_{2.5}$ NAAQS).[194]

Under longstanding guidance, the EPA has recommended presumptive limits on the amounts of emission reductions from certain voluntary and other nontraditional measures that may be credited in a SIP. Specifically, for voluntary mobile source emission reduction programs, the EPA has identified a presumptive limit of 3% of the additional emission reductions (beyond reductions from baseline measures) required to attain the appropriate NAAQS, and for any particular SIP submittal to demonstrate attainment or maintenance of the NAAQS or progress toward attainment (RFP), 3% of the specific statutory requirement.[195] The EPA may, however, approve measures for SIP credit in amounts exceeding the presumptive limits where a clear and convincing justification is made by the State as to why a higher limit should apply in a given case.[196]

According to the State, the SJV's topography and meteorology present significant challenges for air quality. As stated in the 2018 $PM_{2.5}$ Plan, ''the surrounding mountains trap pollution and block airflow'' and ''[t]emperature inversions, while present to some degree throughout the year, can last for days during the winter, holding in nighttime accumulations of pollutants.'' [197] In addition, the State notes that the population of the area continues to grow at a rate higher than the statewide growth rate, leading to increased vehicular traffic along major highways that run through the SJV.[198] Given these unique challenges, both the State and District continue to implement both traditional and non-traditional emission reduction strategies to attain the $PM_{2.5}$ standards in the SJV,

[186] The additional measures submitted as SIP revisions for which the EPA has not proposed action include: The Innovative Clean Transit measure (submitted February 13, 2020); Rules 4311, 4306, and 4320 (submitted March 12, 2021); and Rule 4702 (submitted October 15, 2021).

[187] 85 FR 44206.

[188] 85 FR 44192, 44204.

[189] ''Strategies for Reducing Wood Smoke,'' EPA–456/B–13–01, March 2013, 42.

[190] 85 FR 17382, 17415.

[191] 2021 Progress Report, 7 and Table 3.

[192] 85 FR 16588.

[193] EPA Region IX ''Technical Support Document for EPA's Rulemaking for the California State Implementation Plan California Air Resources Board Resolution 19–26 San Joaquin Valley Agricultural Equipment Incentive Measure,'' February 2020, 4–5, 24–25, and 31.

[194] EPA Region IX, ''Air Plan Approval; San Joaquin Valley Unified Air Pollution Control District,'' final rule signed December 16, 2021. The EPA deferred action on the NRCS portion of the Agricultural Equipment Incentive Measure.

[195] EPA, ''Guidance on Incorporating Voluntary Mobile Source Emission Reduction Programs in State Implementation Plans (SIPs),'' October 24, 1997, 5.

[196] EPA, ''Incorporating Emerging and Voluntary Measures in a State Implementation Plan (SIP),'' October 4, 2004, 9; see also EPA, ''Guidance on Incorporating Bundled Measures in a State Implementation Plan,'' August 16, 2005, 8, n.6, and EPA, ''Diesel Retrofit and Replacement Projects: Quantifying and Using Their Emission Benefits in SIPs and Conformity: Guidance for State and Local Air and Transportation Agencies,'' March 2018, 12.

[197] 2018 $PM_{2.5}$ Plan, Ch. 2, 2–1.

[198] Id. at Ch. 2, 2–4.

including regulatory programs, incentive programs, and rigorous outreach and education efforts.[199]

Over the past several decades, the State and District have developed and implemented several comprehensive plans to address attainment of the NAAQS for ozone and particulate matter.[200] These attainment plans have resulted in CARB and District's adoption of numerous regulations for stationary, area, and mobile sources, many of which are among the most stringent control measures in the nation. Given the air quality needs of the area, the numerous control measures that both the State and District have adopted and implemented in the San Joaquin Valley to date, the State's and District's successful implementation of the Carl Moyer program over the last two decades, and our experience to date quantifying emission reductions achieved through this program,[201] we believe it is appropriate to allow the State to rely on the Agricultural Equipment Incentive Measure to achieve 13.2% (4.46 tpd) of the additional NO_X reductions and 11.8% (0.26 tpd) of the additional direct $PM_{2.5}$ reductions necessary for the area to attain the 2012 annual $PM_{2.5}$ NAAQS by the end of 2025.[202] Moreover, all Carl Moyer and FARMER projects are subject to detailed contract provisions that CARB may enforce against the grantee at any time during the contract term, a program feature that further supports the State's reliance on the Agricultural Equipment Incentive Measure for emission reductions exceeding the EPA's presumptive limits.[203]

For purposes of the EPA's proposed rule on the Serious area plan for the 2012 annual $PM_{2.5}$ NAAQS, we propose to approve 4.46 tpd NO_X and 0.26 tpd direct $PM_{2.5}$ for the Carl Moyer and FARMER portions of this measure towards CARB's tonnage commitments for 2025 (for attaining the 2012 annual $PM_{2.5}$ NAAQS).

Third, CARB adopted the Lower Opacity Limits for Heavy-Duty Vehicles measure as revisions to the Heavy-Duty Vehicle Inspection Program (HDVIP) and Periodic Smoke Inspection Program (PSIP). CARB estimated 1,170 tons of PM emissions benefits from the heavy-duty trucking transportation sector from 2019 to 2025.[204] CARB also estimates that this measure will achieve 0.02 tpd direct $PM_{2.5}$ reductions by January 1, 2025.[205] However, CARB has not yet provided its analysis of the basis for this emission reduction estimate. Therefore the EPA is not proposing at this time to credit this measure with any particular amount of emission reductions towards attainment of the 2012 annual $PM_{2.5}$ NAAQS in the SJV.

Fourth, the Agricultural Burning Phase-out Measure is a significant substitute measure that was not part of the State's original control measure commitments. The Agricultural Burning Phase-out Measure, for purposes of state law, was adopted by the District on June 17, 2021,[206] and concurred upon by CARB on June 18, 2021,[207] and later adopted by the District on November 18, 2021, as a revision to the California SIP.[208] Previously, through Rule 4103 (''Open Burning''), as amended April 15, 2010, the District restricted the type of materials that may be burned and established other conditions and procedures for open burning in conjunction with the District's Smoke Management Program.[209] The EPA approved Rule 4103 and the associated table of the restrictions on open burning by crop category into the California SIP on January 4, 2012.[210] The District identifies Rule 4103 as a baseline measure in the 2018 $PM_{2.5}$ Plan.[211] The Agricultural Burning Phase-out Measure, in turn, includes a schedule to phase-out (*i.e.,* introduce prohibitions of) agricultural burning for additional crop categories or materials accounting for a vast majority of the tonnage of agricultural waste in phases starting January 1, 2022, and becoming fully implemented by January 1, 2025.[212] The District estimates that this measure will achieve emission reductions of 1.04 tpd NO_X and 1.54 tpd direct $PM_{2.5}$ in 2025.[213]

The EPA has evaluated this measure and has proposed to approve the measure into the California SIP.[214] The EPA considers the Agricultural Burning Phase-out Measure to be an important new measure given the phase-out structure of the measure for most remaining crop categories and the large scale of agricultural activities that produce such agricultural waste and burning thereof in the SJV. While the District assumed a 100% rule effectiveness rate, the EPA noted our general guideline of 80% rule effectiveness and that, notwithstanding the statements in the 2021 Progress Report regarding the permitting requirements for farming operations to burn their waste and the enforceability of the measure, the District did not apply a rule effectiveness rate nor address all the factors that are relevant to determining such a rate.[215] Therefore, the EPA proposes that an 80% rule effectiveness is reasonable for this measure.

For purposes of reviewing the Serious area plan for the 2012 annual $PM_{2.5}$ NAAQS, the EPA has reviewed the District's method for calculating the emission reductions that this measure will achieve by January 1, 2025.

[199] Id. at Ch. 2, 2–2.

[200] See, *e.g.,* 69 FR 30005 (May 26, 2004) (approving plan to attain the 1987 PM_{10} NAAQS), 76 FR 69896 (November 9, 2011) (partially approving and partially disapproving plan to attain the 1997 $PM_{2.5}$ NAAQS), 77 FR 12652 (March 1, 2012) (approving plan to attain the 1997 8-hour ozone NAAQS), and 81 FR 19492 (April 5, 2016) (approving plan to attain the 1979 1-hour ozone NAAQS).

[201] The EPA has approved two prior incentive-based SIP submissions from CARB that rely on Carl Moyer projects for SIP emission reduction credit. See 86 FR 3820 (January 15, 2021) (full approval of South Coast incentive measure) and 81 FR 53300 (August 12, 2016) (limited approval/disapproval of ''Emission Reduction Report'' for San Joaquin Valley).

[202] The EPA calculated these percentages based on the additional emission reductions necessary to attain beyond the baseline inventory for 2025: 4.46 tpd NO_X/33.88 tpd NO_X = 13.2%; and 0.26 tpd direct $PM_{2.5}$/2.2 tpd direct $PM_{2.5}$ = 11.8%.

[203] 2011 Carl Moyer Guidelines, Part I, Chapter 3, Section Y (''Minimum Contract Requirements'') and 2017 Carl Moyer Guidelines, Volume I, Part 1, Chapter 3, Section V (''Minimum Contract Requirements''), para. 11 (''Repercussions for Nonperformance'').

[204] CARB, ''Proposed Amendments to the Heavy-Duty Vehicle Inspection Program and Periodic Smoke Inspection Program, Staff Report: Initial Statement of Reasons,'' release date April 3, 2018, 15. See also, EPA Region IX, ''Technical Support Document for EPA's Rulemaking for the California State Implementation Plan, California Air Resources Board—Title 13, Division 3, Chapter 3.5; Opacity Testing of Heavy-Duty Diesel Vehicles,'' July 2021, 4.

[205] 2021 Progress Report, 16 and Table 2.

[206] SJVUAPCD Resolution 21–06–12, June 17, 2021.

[207] Letter dated June 18, 2021, from Richard W. Corey, Executive Officer, CARB, to Samir Sheikh, Executive Director, SJVUAPCD.

[208] SJVUAPCD Resolution 21–11–7, November 18, 2021. See also, Letter dated October 20, 2021, from Richard W. Corey, Executive Officer, CARB, to Deborah Jordan, Acting Regional Administrator, EPA Region IX.

[209] SJVUAPCD Rule 4103, as amended April 15, 2010.

[210] 77 FR 214 (January 4, 2012). The table of open burning restrictions by crop category is codified at 40 CFR 52.220(c)(388)(i)(B)(*3*) Table 9–1, Revised Proposed Staff Report and Recommendations on Agricultural Burning, approved by the District on May 20, 2010.

[211] 2018 $PM_{2.5}$ Plan, Chapter 4, tables 4–2 and 4–3, and App. C.

[212] 2021 Supplemental Report and Recommendations, Table 2–1 (''Accelerated Reductions by Crop Category'').

[213] SJVUAPCD, ''District 4103 (Open Burning) Technical Submittal for Receiving SIP Credit for Reductions in Agricultural Burning,'' October 18, 2021, Table 6. See also, Progress Report, Table 3.

[214] EPA Region IX, ''Air Plan Approval; California; San Joaquin Valley Unified Air Pollution Control District; Open Burning,'' proposed rule signed December 16, 2021.

[215] EPA Region IX, ''Technical Support Document for EPA's Rulemaking for the California State Implementation Plan, San Joaquin Valley Unified Air Pollution Control District's Agricultural Burning Phase-Out Measure,'' December 2021.

Specifically, the District calculated the annual average emissions of agricultural burning following full implementation of the phase-out (*i.e.,* by January 1, 2025), considering the tonnages of waste and emission factors of each crop category (0.51 tpd NO_X and 0.67 tpd direct $PM_{2.5}$).[216] The District then subtracted these values (*i.e.,* the additional reductions from the revised measure) from the annual average emissions in the baseline emissions inventory of the 2018 $PM_{2.5}$ Plan for the 2025 attainment year (1.55 tpd NO_X and 2.21 tpd direct $PM_{2.5}$).[217] The resulting difference represents the annual average emission reductions to be achieved by the measure (1.04 tpd NO_X and 1.54 tpd direct $PM_{2.5}$).[218]

The EPA proposes that this is an appropriate calculation method to estimate the emission reductions from the Agricultural Burning Phase-out Measure. It builds upon the baseline measure in the Plan for this source category (*i.e.,* Rule 4103, amended April 15, 2010, and Table 9–1, adopted May 20, 2010), applies appropriate emission factors, and identifies the difference between the Plan's baseline emissions and the emissions that would remain following full implementation of the measure. The January 1, 2025 deadline for final implementation is also consistent with the implementation deadline under 40 CFR 51.1011(b)(5) for control measures necessary for attainment by December 31, 2025. However, the EPA proposes to apply an 80% rule effectiveness rate, rather than the 100% rule effectiveness rate used in the District's calculation.[219] After applying this effectiveness rate, the EPA proposes to credit this measure with emissions reductions of 0.83 tpd NO_X and 1.23 tpd direct $PM_{2.5}$ in 2025 (*i.e.,* subtract these values from the District's tonnage commitments for 2025). We provide further detail on this measure in sections III.B.1.a and IV.B.3.e of the EPA's 2012 Annual $PM_{2.5}$ TSD.

The EPA anticipates finalizing action on the proposed rule on the Agricultural Burning Phase-out Measure prior to or concurrent with final action on the Serious area plan for the 2012 annual $PM_{2.5}$ NAAQS for the SJV. Accordingly, Table 5 of this proposed rule summarizes the total NO_X and direct $PM_{2.5}$ emission reductions necessary to attain the 2012 annual $PM_{2.5}$ NAAQS in the SJV by December 31, 2025, the emission reductions attributed to baseline measures and new control strategy measures (including only measures approved or proposed for approval into the California SIP), and the emission reductions remaining as aggregate tonnage commitments. We estimate that 13.8% of the NO_X reductions necessary for attainment and 8.0% of the direct $PM_{2.5}$ reductions necessary for attainment remain as aggregate tonnage commitments. This remaining commitment is split between CARB and the District, as described further in this proposed rule. Notably, however, if the approval of the Agricultural Burning Phase-out Measure is finalized as proposed, the District will have met its direct $PM_{2.5}$ emission reduction commitment of 1.3 tpd and, in fact, exceeded it by 0.13 tpd.[220]

TABLE 5—REDUCTIONS NEEDED FOR ATTAINMENT IN 2025 AND AGGREGATE TONNAGE COMMITMENTS

		NO_X (tpd)	Direct $PM_{2.5}$ (tpd)
A	Total reductions needed from baseline and control strategy measures	207.38	6.4
B	Reductions from baseline measures	173.5	4.2
C	Reductions from additional measures *approved* into the California SIP	4.46	0.46
D	Reductions from additional measures *proposed for approval* into the California SIP	0.83	1.23
E	Total reductions remaining as commitments (A − B − C − D)	28.59	0.51
F	Percent of total reductions needed remaining as commitments (E/A)	13.8%	8.0%

Sources: 2018 $PM_{2.5}$ Plan, Ch. 4, tables 4–3 and 4–7, and Appendix B, tables B–1 and B–2; EPA final rule signed December 16, 2021 (partial approval of the Agricultural Equipment Incentive Measure); and EPA proposed rule signed December 16, 2021 (proposing to approve the Agricultural Burning Phase-out Measure) and EPA Region IX, ''Technical Support Document for EPA's Rulemaking for the California State Implementation Plan, San Joaquin Valley Unified Air Pollution Control District's Agricultural Burning Phase-Out Measure,'' December 2021.

Beyond the three measures that the EPA proposes to credit towards the aggregate tonnage commitments, CARB and the District have made substantial progress in developing and adopting additional measures, as described in the 2021 Progress Report. CARB has provided updated emission reduction estimates for 10 additional measures, including 9 that have been adopted, as well as one substitute measure in development. The CARB measure with the largest updated emission reduction estimates is Heavy-Duty I/M. In the Valley State SIP Strategy, CARB originally estimated that Heavy-Duty I/M would achieve 6.8 tpd NO_X and <0.1 tpd direct $PM_{2.5}$ in 2025 and described the regulatory concepts that would reflect the current (as of 2018) ''advanced engine and exhaust control technologies, including on-board diagnostics (OBD).''[221] Since that time, as described in the 2021 Progress Report, California has developed additional provisions related to Heavy-Duty I/M that would achieve additional emission reductions.[222]

In particular, CARB states that California Senate Bill 210, signed into law in 2019, enhances the regulatory authority of this program by requiring that on-road heavy-duty vehicles comply with Heavy-Duty I/M in order to register annually with the California Department of Motor Vehicles. CARB also states that the periodic testing component of the program would be complemented by ''a new component, roadside emissions monitoring (remote sensing devices and/or CARB's Portable Emissions AcQuisition System, known as PEAQS) to detect high emitting

[216] Agricultural Burning Phase-out Measure, Table 6.

[217] Id. at Table 4. See also, 2018 $PM_{2.5}$ Plan, C–15 (''Emissions Inventory'' table for open burning).

[218] Agricultural Burning Phase-out Measure, Table 6.

[219] EPA Region IX, ''Technical Support Document for EPA's Rulemaking for the California State Implementation Plan, San Joaquin Valley Unified Air Pollution Control District's Agricultural Burning Phase-Out Measure,'' December 2021.

[220] The direct $PM_{2.5}$ emission reduction from Rule 4901 (0.2 tpd) and the Agricultural Burning Phase-out Measure (1.23 tpd) sum to 1.43 tpd, which exceeds the 1.3 tpd direct $PM_{2.5}$ commitment by 0.13 tpd.

[221] Valley State SIP Strategy, 19–20 and Table 8.

[222] 2021 Progress Report, 19. CARB notes that further detail on emission reduction calculations can be found in the CARB staff report on Heavy-Duty I/M, released October 15, 2021. See, CARB, ''Staff Report: Initial Statement of Reasons, Public Hearing to Consider the Proposed Heavy-Duty Inspection and Maintenance Regulation,'' October 8, 2021, (''Heavy-Duty I/M ISOR'') and App. H (''Proposed Heavy-Duty Inspection and Maintenance Regulation, Standardized Regulatory Impact Assessment'').

vehicles between periodic test cycles and require additional testing and repair to ensure emissions control components are operating properly.'' [223] CARB estimates that Heavy-Duty I/M, as further developed since the Valley State SIP Strategy, will achieve 14.7 tpd NO_X and 0.03 tpd direct $PM_{2.5}$ in 2025 (*i.e.,* roughly half the remaining aggregate commitment for NO_X).

The EPA is not proposing to credit that amount of emission reductions towards the aggregate tonnage commitments at this time. The EPA would only take such action after Heavy-Duty I/M is approved by the California Office of Administrative Law, and the State submits the measure as a revision to the California SIP. Notwithstanding the fact that the EPA is not proposing to credit this program at this time, the EPA notes that CARB has developed this first-of-its-kind measure for on-road heavy-duty vehicles, documented its extensive regulatory and technical analyses in the measure's Initial Statement of Reasons and associated appendices,[224] and explained how the provisions of the program have been expanded relative to those originally conceived as of 2018.

CARB has also been developing a substitute In-Use Locomotive Measure and plans to present the measure for board consideration in 2022.[225] The regulatory concepts in development for this measure include a ''Spending Account, Useful Life Limit, a 30-minute idling limit as well as reporting and recordkeeping requirements.'' [226] CARB estimates that this measure will achieve reductions of 1.14 tpd NO_X and 0.03 tpd direct $PM_{2.5}$ in 2025.[227] The EPA is aware of CARB's development of an In-Use Locomotive Measure and is not proposing to credit any amount of emission reductions towards the aggregate tonnage commitments.

The District has similarly provided updated emission reduction estimates for eight additional measures, including seven that have been adopted. The District measures with the largest updated emission reduction estimates include amendments to Rule 4702 (''Internal Combustion Engines'') (0.61 tpd NO_X), the Residential Wood Burning Devices Incentive Projects measure (0.33 tpd direct $PM_{2.5}$), and Rule 4354 (''Glass Melting Furnaces'') (0.5 tpd NO_X and 0.04 tpd direct $PM_{2.5}$), as well as amendments planned in 2022 to Rule 4550 (''Conservation Management Practices'') (0.32 tpd direct $PM_{2.5}$).

At this time, the EPA is not proposing to credit towards the aggregate tonnage commitments the updated emission reduction estimates from these additional CARB and District measures (beyond those we propose to credit elsewhere in this proposed rule). The EPA will review and take action on the CARB and District measures submitted to date (Innovative Clean Transit, Rule 4311, Rule 4306, Rule 4320, and Rule 4702), as well as measure submissions in the future, in separate rulemakings, during which time the public will have an opportunity to review and provide comment. Although we are not proposing to credit reductions from these measures at this time, we have evaluated the updated emission reduction estimates to assess whether NO_X and/or direct $PM_{2.5}$ emission reduction commitments would be met or, conversely, how much emission reductions would remain of CARB and the District's aggregate tonnage commitments.

Specifically, of the 12 additional measures for which CARB has provided updated emission reduction estimates, the emission reductions sum to 20.89 tpd NO_X and 0.61 tpd direct $PM_{2.5}$.[228] Similarly, of the eight additional measures for which the District has provided updated emission reduction estimates, the emission reductions sum to 1.69 tpd NO_X and 0.76 tpd direct $PM_{2.5}$.[229]

The combined emission reductions from these additional measures are 22.58 tpd NO_X and 1.37 tpd direct $PM_{2.5}$. Subtracting these amounts from the remaining aggregate tonnage commitments of 28.59 tpd NO_X and 0.51 tpd direct $PM_{2.5}$ (*i.e.,* Row E of Table 5 of this proposed rule) would result in necessary, remaining reductions of 6.01 tpd NO_X to achieve the modeled attainment reductions and an excess 0.86 tpd direct $PM_{2.5}$.[230] Notably, the District would have exceeded its aggregate tonnage commitments by 0.64 tpd NO_X and 0.89 tpd direct $PM_{2.5}$.[231] CARB would have remaining emission reductions of 6.65 tpd NO_X and 0.03 tpd direct $PM_{2.5}$.[232]

With respect to CARB's remaining emission reductions for NO_X, as well as any future decrease in any updated emission reduction estimates in the 2021 Progress Report and/or any smaller amount of credit that the EPA may approve for those measures, we have considered the role of additional measures for which CARB and the District have not yet quantified an updated emission reduction estimate.

CARB identifies four measures of its original control measure commitments with updated emission reduction estimates of ''<<0.1'' or ''N/A,'' each of which is overdue. First, the Zero-Emission Airport Ground Support Equipment measure, for which the updated year for board consideration is not specified, had original emission reduction estimates that were quite small at <0.1 tpd NO_X and <0.1 tpd direct $PM_{2.5}$. Second, the Low-emission

[223] 2021 Progress Report, 19.

[224] Heavy-Duty I/M ISOR and, for example, Heavy-Duty I/M ISOR, App. D (''Emissions Inventory Methods and Results, Proposed Heavy-Duty Inspection and Maintenance Regulation'') and App. H (''Proposed Heavy-Duty Inspection and Maintenance Regulation, Standardized Regulatory Impact Assessment'').

[225] 2021 Progress Report, Table 2.

[226] Id. at 20–21. Additional information on CARB's regulatory concepts for the In-Use Locomotive Measure are available at: *https://ww2.arb.ca.gov/our-work/programs/reducing-rail-emissions-california/locomotives-and-railyards-meetings-workshops*.

[227] 2021 Progress Report, 21 and Table 2.

[228] The EPA calculated these amounts by summing the updated emission reduction estimates for CARB's original set of control measures in the 2021 Progress Report, Table 2 (excluding estimates marked as ''<<0.01'' or ''N/A''), which sum to 25.35 tpd NO_X and 0.87 tpd direct $PM_{2.5}$, and subtracting the amount we propose to credit for the Carl Moyer and FARMER portions of the Agricultural Equipment Incentive Measure, which are 4.46 tpd NO_X and 0.26 tpd direct $PM_{2.5}$. EPA's 2012 Annual $PM_{2.5}$ TSD, Table IV–A. Given the complex legal authorities involved in regulating locomotive emissions, we have conservatively excluded from our analysis the emission reduction estimates in the 2021 Progress Report for CARB's In-Use Locomotive Measure.

[229] The EPA calculated these amounts by summing the updated emission reduction estimates for the District's original set of control measures in the 2021 Progress Report, Table 3 (excluding estimates marked as ''- -''or ''TBD'', and excluding the Agricultural Burning Phase-out Measure, which was not part of the original set), which sum to 1.69 tpd NO_X and 0.96 tpd direct $PM_{2.5}$, and subtracting the amount we propose to credit for Rule 4901, which is 0.2 tpd direct $PM_{2.5}$. EPA's 2012 Annual $PM_{2.5}$ TSD, Table IV–B.

[230] CARB and the District estimate that, considering the updated emission reduction estimates for the original and substitute measures, the remaining aggregate tonnage commitment would be 4.65 tpd NO_X and an excess of 1.2 tpd direct $PM_{2.5}$. 2021 Progress Report, 30. The difference between those sums and the EPA's sums is 0.22 tpd NO_X and 0.31 tpd direct $PM_{2.5}$, which reflects the difference between the SIP credit that we propose for the Agricultural Burning Phase-out Measure (0.83 tpd NO_X, and 1.23 tpd direct $PM_{2.5}$) and the State's claimed reduction (1.04 tpd NO_X and 1.54 tpd direct $PM_{2.5}$), and the emission reduction estimate for the In-Use Locomotive Measures (1.14 tpd NO_X and 0.03 tpd direct $PM_{2.5}$).

[231] The emission reduction from Rule 4901 (0.2 tpd direct $PM_{2.5}$), the Agricultural Burning Phase-out Measure (0.83 tpd NO_X and 1.23 tpd direct $PM_{2.5}$), and additional measures sum to 2.52 tpd NO_X and 2.19 tpd direct $PM_{2.5}$, which would exceed the District's 1.88 tpd NO_X and 1.3 tpd direct $PM_{2.5}$ commitments by 0.64 tpd NO_X and 0.89 tpd direct $PM_{2.5}$.

[232] The emission reduction from the Carl Moyer and FARMER portions of the Agricultural Equipment Incentive Measure and additional measures sum to 25.35 tpd NO_X and 0.87 tpd direct $PM_{2.5}$, which would leave 6.65 tpd NO_X and 0.03 tpd direct $PM_{2.5}$ relative to CARB's commitments of 32 tpd NO_X and 0.9 tpd direct $PM_{2.5}$.

Diesel Fuel Requirement, anticipated for 2022 board consideration, had original emission reduction estimates of 1 tpd NO_X and 0.1 tpd direct $PM_{2.5}$. Of these two regulatory measures, we assume the latter may result in SIP creditable emission reductions for a portion of the 1 tpd NO_X, given the one-year delay in bringing the measure to the board and corresponding likelihood of one-year delay in implementation.

Third and fourth, the Accelerated Turnover of Trucks and Buses Incentive Projects measure and the Accelerated Turnover of Off-Road Equipment Incentive Projects measure had original emission reduction estimates of 8 tpd NO_X and 1.5 tpd NO_X, respectively. As discussed in section IV.F.3.c of this proposed rule, CARB states that it continues to assess the emission reductions from these two incentive-based measures that could be applied towards the aggregate tonnage commitments.[233] We assume that these measures may result in SIP-creditable emission reductions for a portion of the combined 9.5 tpd NO_X.

In addition, CARB has identified further measures that were not included in the original control measure commitments that may provide emission reductions toward CARB's aggregate tonnage commitments.[234] These measures include Cargo Handling Equipment Registration, Construction and Mining Equipment Measure, and Co-Benefits from the Climate Program.

Similarly, the District identifies three measures of its original control measure commitments with updated emission reduction estimates of ''- -'' or ''TBD,'' each of which is overdue, which we outline as follows. First and second, the regulatory measure and incentive-based measure for commercial charbroiling had original emission reduction estimates of 0.53 tpd direct $PM_{2.5}$. The District continues to work on this source category, including the evaluation of ''potential amendments to Rule 4692 in the near future.'' [235] However, we assume that such amendments would not produce NO_X emission reductions.

Third, the District originally estimated emission reductions of 1.07 tpd NO_X from the combination of regulatory and incentive-based measures for stationary internal combustion engines, especially with respect to agricultural engines.[236] Pending the EPA's evaluation of the 2021 amendment to Rule 4702, which claims 0.61 NO_X emission reductions in 2025, this would leave 0.46 tpd NO_X to be achieved by the Agricultural Operation Internal Combustion Engines Incentive Projects measure. We assume that this measure may result in SIP-creditable emission reductions for a portion of the combined 1.07 tpd NO_X.

The EPA does not have information at this time sufficient to quantify a precise amount of NO_X reductions that would result from the Low-emission Diesel Fuel Requirement and incentive-based measures for heavy-duty trucks, off-road equipment, and stationary agricultural internal combustion engines, nor the three additional measures identified in CARB's ''SJV $PM_{2.5}$ SIP Measure Tracking,'' September 2021. Notwithstanding this uncertainty, CARB and the District state that they are ''committed to fulfilling their respective aggregate commitments from the 2018 $PM_{2.5}$ Plan and continue to progress in developing their respective measures within the Plan'' and that upcoming regulations could achieve more reductions than originally anticipated.[237]

In addition, CARB and the District assert that the District has achieved more direct $PM_{2.5}$ emission reductions than they committed to in their aggregate tonnage commitment.[238] Accordingly, they provided additional emissions analysis to assess how excess direct $PM_{2.5}$ emission reductions could be converted to equivalent NO_X emission reductions using an inter-pollutant trading ratio rooted in the sensitivity analyses of the 2018 $PM_{2.5}$ Plan.[239] To be clear, CARB and the District have not formally requested that the EPA apply such inter-pollutant trading for purposes of fulfilling the aggregate tonnage commitments through an equivalent amount of emission reductions. Consistent with past EPA action on $PM_{2.5}$ planning SIP submissions for the SJV,[240] where the State submits a SIP revision that would substitute reductions in one pollutant to achieve a tonnage commitment concerning a different pollutant (*e.g.,* substituting excess direct $PM_{2.5}$ reductions to satisfy a NO_X reduction commitment), it must include an appropriate inter-pollutant trading (IPT) ratio and the technical basis for such ratio. The EPA will review any such IPT ratio and its bases before approving or disapproving any such SIP revision.

Thus, at this time, we are not proposing to approve any particular inter-pollutant trading approach for purposes of meeting the aggregate tonnage commitments, nor applying any excess reductions of one pollutant towards fulfilling a portion of committed reductions of the other pollutant. Nevertheless, we note that because, as proposed, the District's direct $PM_{2.5}$ reductions have exceeded their aggregate tonnage commitment, these excess reductions add a degree of conservativeness to the combined attainment demonstration and control plan. In light of the possibility of future interpollutant trading, we have qualitatively evaluated the State's inter-pollutant trading analysis as part of our assessment of the State's capability to fulfill CARB and the District's aggregate tonnage commitments, as discussed further in section IV.B.5 of the EPA's 2012 Annual $PM_{2.5}$ TSD.

(e) Three-factor Test for Enforceable Commitments

The EPA interprets the CAA to allow for approval of enforceable commitments that are limited in scope where circumstances exist that warrant the use of such commitments in place of adopted and submitted measures.[241] Specifically, CAA section 110(a)(2)(A) provides that each SIP ''shall include enforceable emission limitations and other control measures, means or techniques . . . as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of [the Act].'' Section 172(c)(6) of the Act, which

[233] 2021 Progress Report, 24.

[234] CARB, ''SJV $PM_{2.5}$ SIP Measure Tracking,'' September 2021, 3. Available at: *https://ww2.arb.ca.gov/resources/documents/2018-san-joaquin-valley-pm25-plan.*

[235] 2021 Progress Report, 9.

[236] 2018 $PM_{2.5}$ Plan, Ch. 4, Table 4–3 and App. E, Table E–3.

[237] 2021 Progress Report, 2 and 32.

[238] Id. at 32.

[239] Id. at Table 4 and 33–37.

[240] For example, the EPA has approved an inter-pollutant trading mechanism for use in transportation conformity analyses for the 2006 24-hour $PM_{2.5}$ NAAQS. 85 FR 44192, 44204. In that same final rule, the EPA approved the State's demonstration that it had fulfilled prior aggregate tonnage commitments, in part, by using an inter-pollutant trading approach that the EPA found adequate. 85 FR 44192, 44205; see also proposed rule at 85 FR 17382, 17406–17407 and associated EPA's General Evaluation TSD, Table III–C and section IV.

[241] Commitments approved by the EPA under CAA section 110(k)(3) are enforceable by the EPA and citizens under CAA sections 113 and 304, respectively. In the past, the EPA has approved enforceable commitments and courts have enforced these actions against states that failed to comply with those commitments. See, *e.g., American Lung Ass'n of N.J.* v. *Kean,* 670 F. Supp. 1285 (D.N.J. 1987), aff'd, 871 F.2d 319 (3rd Cir. 1989); *NRDC* v. *N.Y. State Dept. of Env. Cons.,* 668 F. Supp. 848 (S.D.N.Y. 1987); *Citizens for a Better Env't* v. *Deukmejian,* 731 F. Supp. 1448, recon. granted in par, 746 F. Supp. 976 (N.D. Cal. 1990); *Coalition for Clean Air* v. *South Coast Air Quality Mgt. Dist.,* No. CV 97–6916–HLH, (C.D. Cal. Aug. 27, 1999). Further, if a state fails to meet its commitments, the EPA could make a finding of failure to implement the SIP under CAA section 179(a), which starts an 18-month period for the State to correct the non-implementation before mandatory sanctions are imposed.

applies to nonattainment SIPs, is virtually identical to section 110(a)(2)(A). The language in these sections of the CAA is broad, allowing a SIP to contain any ''means or techniques'' that the EPA determines are ''necessary or appropriate'' to meet CAA requirements, such that the area will attain as expeditiously as practicable, but no later than the designated date. Furthermore, the express allowance for ''schedules and timetables'' demonstrates that Congress understood that all required controls might not have to be in place before a SIP could be fully approved.

Once the EPA determines that circumstances warrant consideration of an enforceable commitment to satisfy a CAA requirement, it considers three factors in determining whether to approve the enforceable commitment: (a) Does the commitment address a limited portion of the CAA requirement; (b) is the state capable of fulfilling its commitment; and (c) is the commitment for a reasonable and appropriate period of time.[242]

With respect to the SJV $PM_{2.5}$ Plan, circumstances warrant the consideration of enforceable commitments as part of the attainment demonstration for this area. As shown in Table 5 of this proposed rule, the majority of the emissions reductions needed to demonstrate attainment and RFP in the SJV are achieved by rules and regulations adopted prior to the State's development of the SJV $PM_{2.5}$ Plan, *i.e.,* baseline measures. As a result of these already-adopted CARB and District measures, most air pollution sources in the SJV were already subject to stringent rules prior to the development of the SJV $PM_{2.5}$ Plan, leaving fewer and more technologically-challenging opportunities to reduce emissions. Despite these significant emission reductions, as shown in Table 4 of this proposed rule, the State needs to reduce NO_X and direct $PM_{2.5}$ emission levels by a total of 65.4% and 10.2%, respectively, from 2013 base year levels in order to attain the 2012 annual $PM_{2.5}$ NAAQS by the end of 2025 in the SJV.

As part of their respective control measure commitments in the SJV $PM_{2.5}$ Plan, CARB and the District identified potential control measures that they expected to achieve the additional emissions reductions needed for attainment. The timeline needed to develop, adopt, and implement these measures extended beyond the year of Plan adoption, with most measures originally scheduled for board consideration in 2019, 2020, and 2021. Both CARB and the District have made substantial progress in adopting the rules and measures listed in their respective control measure commitments, as well as one important substitute measure, but have not yet completely fulfilled the control measure commitments. Given these circumstances, we conclude that CARB and District's reliance on enforceable commitments in the SJV $PM_{2.5}$ Plan is warranted. Therefore, we have considered the three factors the EPA uses to determine whether the use of enforceable commitments in lieu of adopted measures satisfies CAA planning requirements.

(1) The Commitment Represents a Limited Portion of Required Reductions

For the first factor, we look to see if the commitment addresses a limited portion of a statutory requirement, such as the amount of emissions reductions needed to attain the NAAQS in a nonattainment area. As shown in Table 5 of this proposed rule, most of the total emission reductions needed to attain the 2012 annual $PM_{2.5}$ NAAQS in the SJV by the end of 2025 will be achieved through implementation of baseline measures and additional measures for which the EPA has finalized or proposed approval, leaving 13.8% (28.59 tpd) of the necessary NO_X reductions and 8.0% (0.51 tpd) of the necessary direct $PM_{2.5}$ reductions as aggregate tonnage commitments.

Given the nature of the $PM_{2.5}$ challenge in the SJV, the significant reductions in NO_X and direct $PM_{2.5}$ emission levels achieved through implementation of baseline measures over the past several decades, and the difficulty of identifying additional control measures that are feasible for implementation in the area, we consider it reasonable for CARB and District to seek additional time to develop and adopt the last increment of emission reductions necessary for attainment by 2025.

Therefore, we conclude that the emission reductions remaining as enforceable commitments in the SJV $PM_{2.5}$ Plan represent a limited portion of the total emissions reductions needed to demonstrate attainment of the 2012 annual $PM_{2.5}$ NAAQS by December 31, 2025.

(2) The State Is Capable of Fulfilling Its Commitment

For the second factor, we consider whether the State and District are capable of fulfilling their commitments. As discussed in section IV.F.3.c of this proposed rule and shown in tables IV.A and IV.B of the EPA's 2012 Annual $PM_{2.5}$ TSD, the EPA notes that CARB and the District have made substantial progress in developing and adopting the regulatory measures listed in their respective control measure commitments. Specifically, CARB and the District have adopted 18 measures of the 27 control measure commitments in the SJV $PM_{2.5}$ Plan. CARB has adopted 10 measures (including one incentive-based measure) and begun the public process on 3 of the remaining 5 measures. The adopted measures include, for example, Heavy-Duty I/M, the California Heavy-Duty Low-NO_X Engine Standard, the SORE regulation, and the Agricultural Equipment Incentive Measure.

The District has adopted eight measures (including one incentive-based measure) and begun the public process on two of the remaining four measures. The adopted measures include, for example, amendments to Rule 4311 (''Flares''), Rule 4702 (''Internal Combustion Engines''), and Rule 4901 (''Woodburning Fireplaces and Wood Burning Heaters'') (Hot-spot strategy), and the Residential Wood Burning Devices Incentive Projects measure.

As discussed in section IV.3.d of this proposed rule, the remaining aggregate tonnage commitments sum to 28.59 tpd NO_X and 0.51 tpd direct $PM_{2.5}$. We also note that, pending final approval of the Agricultural Burning Phase-out Measure, that the District will have met its 1.3 tpd direct $PM_{2.5}$ commitment and, in fact, exceeded it by 0.13 tpd. Based on our review of the State's 2021 Progress Report, CARB has adopted 10 additional measures and advanced their development and analysis of two additional measures of the Plan's original control measure commitments (one slated for board consideration in 2022 and one as early as 2022), and also developed a substitute measure (slated for board consideration in 2022). Similarly, beyond the two adopted measures (Rule 4901 and the Agricultural Burning Phase-out Measure) that the EPA proposes to credit towards the aggregate tonnage commitments, the District has adopted seven additional measures.

The updated emission reduction estimates for this series of additional CARB and District measures sum to

[242] The Fifth Circuit Court of Appeals upheld the EPA's interpretation of CAA sections 110(a)(2)(A) and 172(c)(6) and the Agency's use and application of the three factor test in approving enforceable commitments in the 1-hour ozone SIP for Houston-Galveston. *BCCA Appeal Group* v. *EPA,* 355 F.3d 817 (5th Cir. 2003). More recently, the Ninth Circuit Court of Appeals upheld the EPA's approval of enforceable commitments in ozone and $PM_{2.5}$ SIPs for the SJV, based on the same three factor test. *Committee for a Better Arvin* v. *EPA,* 786 F.3d 1169 (9th Cir. 2015).

22.58 tpd NO_X and 1.37 tpd direct $PM_{2.5}$. Relative to the original emission reduction estimates in the SJV $PM_{2.5}$ Plan, these estimated emission reductions are more robust in that they reflect adopted measures and associated technical analyses, as well as further measure development and estimation. Pending the additional steps that precede submission of the measures to the EPA and the EPA's future evaluation of and rulemaking on each measure, subtracting these amounts from the remaining aggregate tonnage commitments would result in necessary, remaining reductions of 6.01 tpd NO_X to achieve the modeled attainment reductions and an excess 0.86 tpd direct $PM_{2.5}$. The District would have exceeded its aggregate tonnage commitments by 0.64 tpd NO_X and 0.89 tpd direct $PM_{2.5}$. CARB would have remaining emission reductions of 6.65 tpd NO_X and 0.03 tpd direct $PM_{2.5}$.

As further discussed in section IV.F.3.d of this proposed rule, we have considered the role of additional measures for which CARB and the District have not yet quantified an updated emission reduction estimate, which includes several CARB and District measures that may yet achieve sufficient emission reductions to fulfill the remaining aggregate tonnage commitment for NO_X. CARB and the District state that they are ''committed to fulfilling their respective aggregate commitments from the 2018 $PM_{2.5}$ Plan and continue to progress in developing their respective measures within the Plan'' and that upcoming regulations could achieve more reductions than originally anticipated.[243]

Beyond the measures discussed above, both CARB and the District have well-established incentive grant programs to reduce emissions from mobile, stationary, and area sources in the SJV. Funding for the State's incentive programs in the SJV comes from various sources including the Carl Moyer Program, Proposition 1B Goods Movement Emission Reduction Program, Greenhouse Gas Reduction Fund, and the Funding Agricultural Replacement Measures for Emission Reductions (FARMER) program.[244] Funding for the District's incentive programs comes from a combination of federal, State, and local funding mechanisms, including the Diesel Emission Reduction Act (DERA) and Target Airshed Grant programs, the Carl Moyer program, and fees assessed in the SJV by the California Department of Motor Vehicles and by the District through programs for Indirect Source Review, Voluntary Emission Reduction Agreements, and large boilers, steam generators, and process heaters.[245]

Collectively, these incentive funds have been applied to a wide range of emission sources, including heavy-duty trucks, light-duty vehicles, mobile agricultural equipment, locomotives, school buses, alternative fuel infrastructure, community-based programs, agricultural irrigation pumps, residential wood combustion devices, and commercial charbroilers.[246] The Plan identifies the total funding need for expeditious attainment as $5 billion, including $3.3 billion for heavy-duty trucks and buses and $1.4 billion for mobile agricultural equipment.[247]

However, CARB staff explained that, in light of the progress to-date on committed-to regulatory measures and these two substitute measures, fewer incentive-based emission reductions may ultimately be needed to demonstrate attainment of the 2012 annual $PM_{2.5}$ NAAQS.[248] For heavy-duty trucks and off-road equipment, CARB notes that incentives have paid for the turn-over of such equipment, but that many of the projects do not have contract lives that span the attainment year (2025) and therefore would not be creditable for the purposes of the 2012 annual $PM_{2.5}$ NAAQS. Conversely, CARB states that it will achieve 5.1 tpd NO_X and 0.3 tpd direct $PM_{2.5}$ emission reductions in 2025 via the Agricultural Equipment Incentive Measure, which relies on funding from the Carl Moyer, FARMER, and NRCS programs. For the two State-funded programs, CARB states that Carl Moyer funding is expected to increase in future years, following enactment of California Assembly Bill 1274,[249] and that the recent (fiscal year 2021–2022) state budget provides $212.6 million for FARMER program statewide[250]—the largest annual amount to date. The SJV portion of such FARMER funding has historically been 80%.[251] Given our proposal to credit the Agricultural Equipment Inventive Measure for significant emission reductions towards CARB's aggregate tonnage commitments in 2025, the renewed, large investment in the fiscal year 2021–2022 FARMER program, and potential for increases in funding for the Carl Moyer program, the EPA anticipates that CARB will be able to develop an additional agricultural equipment incentive measure that produces SIP-creditable emission reductions.

More broadly, whether for regulatory measures or incentive-based measures, we note also that CARB and the District will have to submit to the EPA, for SIP approval, any control measure that it intends to rely on to satisfy the aggregate tonnage commitments in the Plan. Furthermore, where CARB or the District intend to substitute reductions in one pollutant to achieve a tonnage commitment concerning a different pollutant (*e.g.,* substituting direct $PM_{2.5}$ reductions to satisfy a NO_X reduction commitment), it must include an appropriate inter-pollutant trading (IPT) ratio and the technical basis for such ratio. The EPA will review any such IPT ratio and its bases before approving or disapproving the measure.

Given CARB and the District's progress in adopting 18 measures to date, their substantial progress toward achieving the aggregate tonnage commitments, including the District having met and exceeded its direct $PM_{2.5}$ commitment, their ongoing efforts to develop additional measures, and their stated intent to continue to fulfill their respective commitments, we propose that CARB and the District are capable of fulfilling the remaining increment of NO_X emission reductions necessary to attain the 2012 annual $PM_{2.5}$ NAAQS in the SJV by December 31, 2025.

(3) The Commitment is for a Reasonable and Appropriate Timeframe

For the third factor, we consider whether the commitment is for a reasonable and appropriate period of time. As discussed in section II.B of this proposed rule, on March 23, 2017, CARB adopted the 2016 State Strategy and directed staff to return to the Board with a commitment to achieve additional emission reductions from

[243] 2021 Progress Report, 2 and 32.

[244] 2018 $PM_{2.5}$ Plan, App. E, E–6.

[245] Id.

[246] Id. at App. E, E–8 to E–21.

[247] Id. at App. E, Table E–4 (''Incentive Funding Needed for Expeditious Attainment''). The CARB Staff Report describes the status of current incentive funding and CARB's expectations concerning future incentive funding out to 2024 for the SJV. CARB Staff Report, section F (''Status of Incentive Funding''), 24–27.

[248] CARB, ''Valley $PM_{2.5}$ Implementation Update and SIP Amendment,'' September 23, 2021, slides 22–25. Slide 25 illustrates a large decrease in the expected funding need from approximately $5 billion over 2018–2025 to approximately $1 billion over 2021–2025.

[249] 2021 Progress Report, 22.

[250] Id. at 23.

[251] In the inaugural year of the FARMER program, fiscal year 2017–2018, of the $135 million funding allocated state-wide, $108 million (80%) was directed to the SJV. Subsequent allocations to the SJV were $104.3 million (fiscal year 2018–2019) and $43.84 million (fiscal year 2019–2020). CARB, ''Funding Agricultural Replacement Measures for Emission Reductions (FARMER) Program, San Joaquin Valley APCD,'' as reported through September 30, 2020.

mobile sources in the SJV.[252] CARB responded by developing the Valley State SIP Strategy, which includes additional State commitments to achieve accelerated emission reductions for purposes of attaining the $PM_{2.5}$ NAAQS in the SJV.

In the Valley State SIP Strategy, CARB recognized that the earlier attainment dates for the 1997, 2006, and 2012 $PM_{2.5}$ NAAQS in the SJV, compared to ozone attainment dates in the SJV and elsewhere in the State, required accelerating the pace of NO_X reductions.[253] Thus, in the Valley State SIP Strategy CARB identified and committed to achieve emission reductions of 32 tpd of NO_X and 0.9 tpd of direct $PM_{2.5}$ by 2024,[254] significantly greater amounts than those CARB had committed to in the 2016 State Strategy (6 tpd of NO_X and 0.1 tpd of direct $PM_{2.5}$ by 2025).[255]

The SJV $PM_{2.5}$ Plan includes specific rule development, adoption, and implementation schedules designed to meet CARB and the District's commitments to reduce emissions to the levels needed to attain the 2012 annual $PM_{2.5}$ NAAQS in the SJV by 2025. For example, the aggregate commitments in the SJV $PM_{2.5}$ Plan include commitments by both CARB and the District to begin the public process on each of their respective control measure commitments by specific dates ranging from 2015 to 2021. The commitments also identify action and implementation dates ranging from 2018 to 2024 for a number of CARB and District control measures.[256]

As discussed in section IV.F.3.c of this proposed rule, consistent with that schedule, CARB and the District have adopted 18 measures of the 27 control measure commitments and timely began public process on the 4 remaining regulatory measures. While CARB and the District are overdue in proposing the four remaining regulatory measures and the remaining four incentive measures to their respective boards, they have indicated that they will propose at least two of the remaining regulatory measures to their respective boards in 2022, including the Low-emission Diesel Fuel Requirement and Rule 4550 (''Conservation Management Practices''), and one more regulatory measure, the Zero-Emission Off-Road Forklift Regulation Phase 1 measure, as early as 2022.

[252] CARB Resolution 17–7, page 7.

[253] Valley State SIP Strategy, 2–3 and 6.

[254] CARB Resolution 18–49, page 5.

[255] CARB Resolution 17–7, paragraph 7.

[256] 2018 $PM_{2.5}$ Plan, Ch. 4, tables 4–4, 4–5, and 4–8.

We consider that these schedules provide a reasonable and appropriate amount of time for CARB and the District to achieve the remaining emission reductions necessary to attain the 2012 annual $PM_{2.5}$ NAAQS in the SJV by December 31, 2025. We therefore propose to conclude that the third factor is satisfied.

G. Reasonable Further Progress and Quantitative Milestones

1. Requirements for Reasonable Further Progress and Quantitative Milestones

Section 172(c)(2) of the Act provides that all nonattainment area plans shall require reasonable further progress (RFP) toward attainment. In addition, CAA section 189(c) requires that all $PM_{2.5}$ nonattainment area plans contain quantitative milestones for purposes of measuring RFP, as defined in CAA section 171(1), every three years until the EPA redesignates the area to attainment. Section 171(1) of the Act defines RFP as the annual incremental reductions in emissions of the relevant air pollutant as are required by part D, title I of the Act, or as may reasonably be required by the Administrator for the purpose of ensuring attainment of the NAAQS by the applicable attainment date. Neither subpart 1 nor subpart 4 of part D, title I of the Act requires that states achieve a set percentage of emissions reductions in any given year for purposes of satisfying the RFP requirement.

For purposes of the particulate matter NAAQS, RFP has historically been met by showing annual incremental emissions reductions sufficient to maintain ''generally linear progress'' toward attainment by the applicable deadline.[257] As discussed in EPA guidance in the General Preamble Addendum, requiring generally linear progress in reductions of direct PM and relevant PM precursors in an attainment plan may be appropriate in situations where:

- The pollutant is emitted by a large number and range of sources,
- the relationship between any individual source or source category and overall air quality is not well known,
- a chemical transformation is involved (*e.g.,* secondary particulate significantly contributes to PM levels over the standard), and/or
- the emission reductions necessary to attain the $PM_{2.5}$ standards are inventory-wide.[258]

The EPA believes that the facts and circumstances of each specific area will be relevant to whether the emissions reductions meet the agency's expectations for generally linear progress.[259]

The General Preamble Addendum also indicates that requiring generally linear progress may be less appropriate in other situations, such as:

- Where there are a limited number of sources of direct PM or a relevant precursor,
- where the relationships between individual sources and air quality are relatively well defined, and/or
- where the emission control systems utilized (*e.g.,* at major point sources) will result in swift and dramatic emission reductions.

In nonattainment areas characterized by any of these latter conditions, the EPA has recommended that RFP may be met by stepwise progress as controls are implemented and achieve significant reductions soon thereafter. For example, if an area's nonattainment problem can be attributed to a few major stationary sources, EPA guidance recommends that states may meet RFP by ''adherence to an ambitious compliance schedule'' that is likely to yield significant reductions of direct PM or a PM precursor on a periodic basis, rather than on a generally linear basis.[260] The EPA believes that the facts and circumstances of each specific area will be relevant to whether the emissions reductions meet the agency's expectations for stepwise progress.

Plans for PM nonattainment areas should include detailed schedules for compliance with emission control measures in the area and provide corresponding annual emission reductions to be achieved by each milestone in the schedule.[261] In reviewing an attainment plan under subpart 4, the EPA considers whether the annual incremental emissions reductions to be achieved are reasonable in light of the statutory objective of timely attainment. Although early implementation of the most cost-effective control measures is often appropriate, states should consider both cost-effectiveness and pollution reduction effectiveness when developing implementation schedules for control measures, and may implement measures that are more effective at reducing PM earlier to provide greater public health benefits.[262]

In addition to the EPA's longstanding guidance on the RFP requirements for

[257] General Preamble Addendum, 42015.

[258] Id.

[259] 80 FR 15340, 15386.

[260] Id.

[261] General Preamble Addendum at 42016.

[262] Id.

PM, the Agency has established specific regulatory requirements for the $PM_{2.5}$ NAAQS in the $PM_{2.5}$ SIP Requirements Rule for purposes of satisfying the Act's RFP requirements and provided related guidance in the preamble to the rule. Specifically, under the $PM_{2.5}$ SIP Requirements Rule, each $PM_{2.5}$ attainment plan must contain an RFP analysis that includes, at minimum, the following four components: (1) An implementation schedule for control measures; (2) RFP projected emissions for direct $PM_{2.5}$ and all $PM_{2.5}$ plan precursors for each applicable milestone year, based on the anticipated control measure implementation schedule; (3) a demonstration that the control strategy and implementation schedule will achieve reasonable progress toward attainment between the base year and the attainment year; and (4) a demonstration that by the end of the calendar year for each triennial milestone date for the area, pollutant emissions will be at levels that reflect either generally linear progress or stepwise progress in reducing emissions on an annual basis between the base year and the attainment year.[263]

A state intending to meet the RFP requirement on a stepwise basis must provide an appropriate justification for the selected implementation schedule.[264] As the EPA explained in the preamble to the $PM_{2.5}$ SIP Requirements Rule, a state that relies on a stepwise approach to meeting RFP should include ''a clear rationale and supporting information to explain why generally linear progress is not appropriate (*e.g.,* due to the nature of the nonattainment problem, the types of sources contributing to $PM_{2.5}$ levels in the area and the implementation schedule for control requirements at such sources).'' [265] Additionally, states should estimate the RFP projected emissions for each quantitative milestone year by sector on a pollutant-by-pollutant basis.[266]

Section 189(c) of the Act requires that $PM_{2.5}$ attainment plans include quantitative milestones that demonstrate RFP. The purpose of the quantitative milestones is to allow periodic evaluation of the area's progress towards attainment of the $PM_{2.5}$ NAAQS consistent with RFP requirements. Because RFP is an annual emission reduction requirement and the quantitative milestones are to be achieved every three years, when a state demonstrates compliance with the quantitative milestone requirement, it should also demonstrate that RFP has been achieved during each of the relevant three years. Quantitative milestones should provide an objective means to evaluate progress toward attainment meaningfully, *e.g.,* through imposition of emissions controls in the attainment plan and the requirement to quantify those required emissions reductions. The CAA also requires a state to submit, within 90 days after each three-year quantitative milestone date, a milestone report that includes technical support sufficient to document completion statistics for appropriate milestones, *e.g.,* the calculations and any assumptions made concerning emission reductions to date.[267]

The CAA does not specify the starting point for counting the three-year periods for quantitative milestones under CAA section 189(c). In the General Preamble and General Preamble Addendum, the EPA interpreted the CAA to require that the starting point for the first three-year period be the due date for the Moderate area plan submission.[268] Consistent with this longstanding interpretation of the Act, the $PM_{2.5}$ SIP Requirements Rule requires that each plan for a Serious $PM_{2.5}$ nonattainment area that demonstrates attainment by the end of the 10th calendar year following the date of designation contain quantitative milestones to be achieved no later than milestone dates 7.5 years and 10.5 years from the date of designation of the area.[269] The 2018 $PM_{2.5}$ Plan includes a demonstration of attainment by the end of the 10th calendar year following designations (*i.e.,* December 31, 2025). Because the EPA designated the SJV nonattainment for the 2012 annual $PM_{2.5}$ NAAQS effective April 15, 2015,[270] the applicable quantitative milestone dates for purposes of the submitted Serious area plan for this NAAQS in the SJV are October 15, 2022, and October 15, 2025.

Quantitative milestones must provide for objective evaluation of reasonable further progress toward timely attainment of the $PM_{2.5}$ NAAQS in the area and include, at minimum, a metric for tracking progress achieved in implementing SIP control measures, including BACM and BACT, by each milestone date.[271]

2. Summary of State's Submission

Appendix H (''RFP, Quantitative Milestones, and Contingency'') of the 2018 $PM_{2.5}$ Plan contains the State's RFP demonstration and quantitative milestones for the 2012 annual $PM_{2.5}$ NAAQS. Following the identification of a transcription error in the RFP tables of Appendix H, the State submitted a revised version of Appendix H that corrects the transcription error and provides additional information on the RFP demonstration.[272] Given the State's conclusions that ammonia, SO_X, and VOC emissions do not contribute significantly to $PM_{2.5}$ levels that exceed the 2012 annual $PM_{2.5}$ NAAQS in the SJV, as discussed in section IV.B of this proposed rule, the RFP demonstration provided by the State addresses emissions of direct $PM_{2.5}$ and NO_X.[273] Similarly, the State developed quantitative milestones based upon the Plan's control strategy measures that achieve emission reductions of direct $PM_{2.5}$ and NO_X.[274] For the 2012 annual $PM_{2.5}$ NAAQS, the RFP demonstration in the Plan follows a stepwise approach due to the time required for CARB and the District ''to amend rules, develop programs, and implement the emission reduction measures.'' [275] The revised Appendix H provides clarifying information on the RFP demonstration, including additional information to justify the Plan's stepwise approach to demonstrating RFP. This clarifying information did not affect the Plan's quantitative milestones. We describe the RFP demonstration and quantitative milestones in the SJV $PM_{2.5}$ Plan in greater detail below.

(a) Reasonable Further Progress

The State addressed the RFP and quantitative milestone requirements in Appendix H to the 2018 $PM_{2.5}$ Plan submitted in February 2020. The State estimates that emissions of direct $PM_{2.5}$ and NO_X will generally decline from the 2013 base year to the projected 2025 attainment year. The Plan's emissions inventory shows that direct $PM_{2.5}$ and NO_X are emitted by a large number and range of sources in the SJV. Table H–2 in Appendix H contains an anticipated implementation schedule for District

[263] 40 CFR 51.1012(a).

[264] 40 CFR 51.1012(a)(4).

[265] 81 FR 58010, 58057.

[266] Id. at 58056.

[267] CAA section 189(c)(2) and 40 CFR 51.1013(b). See also, $PM_{2.5}$ SIP Requirements Rule, 58065 and General Preamble Addendum, 42016, 42017.

[268] General Preamble, 13539 and General Preamble Addendum, 42016.

[269] 40 CFR 51.1013(a)(2)(i).

[270] 80 FR 2206.

[271] 81 FR 58010, 58064 and 58092.

[272] Appendix H to 2018 $PM_{2.5}$ Plan, submitted February 11, 2020, via the EPA State Planning Electronic Collaboration System. This revised version of Appendix H replaces the version submitted with the 2018 $PM_{2.5}$ Plan on May 10, 2019. All references to Appendix H in this proposed rule are to the revised version of Appendix H submitted February 11, 2020.

[273] 2018 $PM_{2.5}$ Plan, App. H, H–1.

[274] Id. at App. H, H–23 to H–24 (for CARB milestones) and H–20 to H–22 (for District milestones).

[275] Id. at App. H, H–4.

regulatory control measures and Table 4–8 in Chapter 4 of the 2018 $PM_{2.5}$ Plan contains an anticipated implementation schedule for CARB control measures in the SJV. Table H–5 in Appendix H (reproduced in Table 6 of this proposed rule) contains projected emissions for each quantitative milestone year and the attainment year. These emission levels reflect both baseline emissions projections and commitments to achieve additional emission reductions through implementation of new control measures by 2025.[276]

TABLE 6—$PM_{2.5}$ PROJECTED EMISSIONS INVENTORY FOR BASE AND MILESTONE YEARS, INCLUDING BASELINE MEASURES AND EMISSION REDUCTION COMMITMENTS

[Annual average, tpd]

	2013	2019 [a]	2022	2025
Pollutant	Baseline year	Quantitative milestone	Quantitative milestone	Quantitative milestone and attainment year
$PM_{2.5}$	62.5	59.2	58.4	56.1
NO_X	317.2	214.5	179.8	109.8

Source: 2018 $PM_{2.5}$ Plan, Appendix H, Table H–5.

[a] 2019 is a quantitative milestone year in the SJV for the 2012 annual $PM_{2.5}$ NAAQS for purposes of CAA requirements for Moderate $PM_{2.5}$ nonattainment areas.

Table H–6 and Table H–7 of Appendix H (reproduced in Table 7 of this proposed rule) identify the reductions needed for attainment of the 2012 annual $PM_{2.5}$ NAAQS by 2025, and the SJV's projected progress toward attainment in each milestone year.

TABLE 7—EMISSION REDUCTIONS NEEDED FOR ATTAINMENT AND ACHIEVED IN EACH MILESTONE YEAR

[Annual average]

Pollutant	Reductions needed for attainment (from 2013 baseline)	Percent reductions achieved in milestone year		
		2019	2022	2025
		Quantitative milestone	Quantitative milestone	Attainment year
$PM_{2.5}$	6.4 tpd	51.6	64.1	100
NO_X	207.4 tpd	49.5	66.2	100

Source: 2018 $PM_{2.5}$ Plan, Appendix H, tables H–6 and H–7.

Based on the data in tables 6 and 7 of this proposed rule, CARB and the District set RFP targets for the attainment year and quantitative milestone years as shown in Table H–11 of Appendix H (reproduced in Table 8 of this proposed rule). The targets are consistent with a stepwise approach to demonstrating RFP. The emission projections show steady reductions over time. The reductions between the 2013 base year and the 2019 milestone year (51.6% of the direct $PM_{2.5}$ reductions and 49.5% of the NO_X reductions needed for attainment), which we evaluated in the context of the Moderate area requirements for RFP and quantitative milestones, are consistent with a generally linear approach to demonstrating RFP. Emissions further decrease by the 2022 milestone year but fall short of the rate of reductions that would show generally linear progress toward attainment.[277] The Plan relies on a more substantial direct $PM_{2.5}$ and NO_X emission reduction by 2025 due, in large part, to CARB and the District's commitments to achieve additional $PM_{2.5}$ emission reductions from new measures by 2025.

According to the Plan, reductions in both direct $PM_{2.5}$ and NO_X emissions from 2013 base year levels result in emissions levels consistent with attainment in the 2025 attainment year. Based on these analyses, CARB and the District assert that the adopted control strategy and additional commitments for reductions from new control programs by 2025 are adequate to meet the RFP requirement for the 2012 annual $PM_{2.5}$ NAAQS.

TABLE 8—STEPWISE RFP TARGET EMISSION LEVELS AND PROJECTED EMISSION LEVELS FOR MILESTONE AND ATTAINMENT YEARS

[Annual average, tpd]

Pollutant	2019		2022		2025	
	Target	Projected	Target	Projected	Target	Projected
$PM_{2.5}$	59.2	59.2	58.4	58.4	56.1	56.1

[276] In App. H, see tables H–3 (emission projections based on baseline measures) and H–4 (reductions from control measure commitments). The SJV $PM_{2.5}$ Plan includes commitments for reductions from new control measures by 2024 and 2025.

[277] To show generally linear progress, emissions would need to decrease by approximately 75% from 2013 to 2022. The projected decrease for this span of years is 64.1% for direct $PM_{2.5}$ and 66.2% for NO_X.

TABLE 8—STEPWISE RFP TARGET EMISSION LEVELS AND PROJECTED EMISSION LEVELS FOR MILESTONE AND ATTAINMENT YEARS—Continued

[Annual average, tpd]

Pollutant	2019		2022		2025	
	Target	Projected	Target	Projected	Target	Projected
NO_X	214.5	214.5	179.8	179.8	109.8	109.8

Source: 2018 $PM_{2.5}$ Plan, Appendix H, Table H–11.

CARB and the District's control strategy in the 2018 $PM_{2.5}$ Plan for attaining the 2012 annual $PM_{2.5}$ NAAQS relies on ongoing reductions from baseline measures and an aggregate tonnage commitment for the remaining reductions needed for attainment. The majority of the NO_X and $PM_{2.5}$ reductions needed for attainment result from CARB's current mobile source control program. The attainment control strategy in the Plan is projected to achieve total emission reductions of 207.4 tpd NO_X and 6.4 tpd direct $PM_{2.5}$, of which 78% (162 tpd) and 73% (4.7 tpd), respectively, are attributed to CARB's baseline mobile source program.[278] These on-going controls will thus result in additional reductions in NO_X and direct $PM_{2.5}$ emissions between the 2013 base year and 2025 attainment year.[279]

CARB's mobile source control program provides significant ongoing reductions in emissions of direct $PM_{2.5}$ and NO_X from on-road and non-road mobile sources such as light duty vehicles, heavy-duty trucks and buses, non-road equipment, and fuels. For on-road and non-road mobile sources, which represent the largest sources of NO_X emissions in the SJV, Appendix H of the 2018 $PM_{2.5}$ Plan identifies five mobile source regulations and control programs that limit emissions of direct $PM_{2.5}$ and NO_X: The On-Road Heavy-Duty Diesel Vehicles (In-Use) Regulation (''Truck and Bus Regulation''), the In-Use Off-Road Diesel-Fueled Fleets Regulation (''Off-Road Regulation''), the California Low-NO_X Engine Standard for new on-road heavy-duty engines used in medium- and heavy-duty trucks purchased in California, Heavy-Duty I/M, and the second phase of the Advanced Clean Cars Program (''ACC 2'').[280] CARB's mobile source BACM analysis in Appendix D of the 2018 $PM_{2.5}$ Plan provides a more comprehensive overview of each of these programs and regulations, among many others.[281] CARB's emission projections for mobile sources are presented in the Plan's emissions inventory.[282]

The Truck and Bus Regulation, first adopted in 2008 and amended in 2011, has rolling compliance deadlines based on truck engine model year (MY). CARB's implementation of the Truck and Bus Regulation includes phase-in requirements for $PM_{2.5}$ and NO_X emissions reductions that began in 2012 and require nearly all pre-2010 vehicles to have exhaust emissions meeting 2010 MY engine emission levels by 2023.[283] The 2010 MY engines include particulate filters for direct $PM_{2.5}$ control. By 2016, the particulate filter requirement for trucks with a gross vehicle weight rating greater than 26,001 pounds was fully implemented in the SJV and all heavier trucks with 1995 and older model year engines were required to have a 2010 engine installed or to be replaced by a truck with a 2010 MY engine.[284]

For non-road vehicles, CARB adopted the Off-Road Regulation in 2007 to regulate vehicles used in construction, mining, and other industrial applications. The Off-Road Regulation requires owners to (1) replace older engines or vehicles with newer, cleaner models, (2) retire older vehicles or reduce their use, or (3) apply retrofit exhaust controls.[285] Beginning in 2014 for large fleets and in 2017 for medium fleets, non-road fleets are required to meet increasingly stringent fleet average indices over time.[286] These indices reflect a fleet's overall PM and NO_X emissions rates by model year and horsepower.

The District has also adopted numerous stationary and area source rules for direct $PM_{2.5}$ and NO_X emission sources that are projected to contribute to RFP and attainment of the $PM_{2.5}$ standards. These include control measures for stationary internal combustion engines, residential fireplaces, glass manufacturing facilities, agricultural burning sources, and various sizes of boilers, steam generators, and process heaters used in industrial operations. Appendix H of the 2018 $PM_{2.5}$ Plan identifies stationary source regulatory control measures implemented by the District that achieve ongoing $PM_{2.5}$ and/or NO_X reductions through the Plan's RFP milestone years and the attainment year.[287] These measures include seven rule amendments that the District adopted in 2019 through 2021, as discussed in section IV.F.3.c of this proposed rule and tabulated in Table IV–B of the EPA's 2012 Annual $PM_{2.5}$ TSD.

With respect to the 2022 milestone year, Rule 4354 was amended in 2011 to lower certain limits on emissions of NO_X, SO_X, and PM_{10} from container glass, flat glass, and fiberglass manufacturing facilities. Rule 4702 was amended in 2013 to lower the NO_X and SO_X emission limits for various types of internal combustion engines rated at 25 brake horsepower or greater. The District amended Rule 4901 in 2019 to lower the thresholds at which ''No Burn'' days will be imposed to limit direct $PM_{2.5}$ emissions from high-polluting wood burning heaters and fireplaces during the November through February timeframe in three ''hot spot'' counties (Fresno, Kern, and Madera), with implementation beginning November 1, 2019. These rules contribute to additional emission

[278] Id. at Ch. 4, Table 4–7.

[279] Id. at App. H, H–4.

[280] 2018 $PM_{2.5}$ Plan, App. H, H–21 and H–22. Because the ACC 2 measure is not scheduled for implementation until 2026 (see 2018 $PM_{2.5}$ Plan, Table 4–8), which is after the January 1, 2025 implementation deadline under 40 CFR 51.1011(b)(5) for control measures necessary for attainment by December 31, 2025, we are not reviewing this program as part of the control strategy in the SJV $PM_{2.5}$ Plan.

[281] 2018 $PM_{2.5}$ Plan, App. D, Ch. IV.

[282] 2018 $PM_{2.5}$ Plan, App. B.

[283] The State's quantitative milestone report for the 2019 milestone indicates that the requirement for heavier trucks to install diesel particulate filters was fully implemented by 2016. CARB and SJVUAPCD, ''2019 Quantitative Milestone Report for the 2012 $PM_{2.5}$ NAAQS,'' 7, submitted by letter dated January 13, 2020, from Richard W. Corey, Executive Officer, CARB, to Mike Stoker, Regional Administrator, EPA Region IX, with enclosures, 7.

[284] Id.

[285] 2019 QM Report, 9.

[286] A fleet average index is an indicator of a fleet's overall emissions rate of particulate matter and NO_X based on the horsepower and model year of each engine in the fleet.

[287] 2018 $PM_{2.5}$ Plan, App. H, Table H–2.

reductions of direct $PM_{2.5}$ and NO_X from the 2013 base year to the 2022 RFP milestone year. Additional District measures to control sources of direct $PM_{2.5}$ and NO_X are also presented in the Plan's BACM/MSM analyses and reflected in the Plan's baseline emission projections.[288]

For the remainder of the emission reductions necessary for attainment, the SJV $PM_{2.5}$ Plan identifies a series of additional CARB and District commitments to achieve emission reductions through additional control measures and incentive programs that will contribute to attainment of the 2012 annual $PM_{2.5}$ NAAQS by 2025, as discussed in section IV.F.3.c of this proposed rule. For mobile sources, CARB's commitment identifies a list of 12 regulatory measures and 3 incentive-based measures that CARB has committed to propose to its Board for consideration by specific dates.[289] For stationary and area sources, the District's commitment identifies a list of nine regulatory measures and three incentive-based measures that the District has committed to propose to its Board for consideration by specific dates.[290] Both CARB and the District have committed to achieve specific amounts of reductions in direct $PM_{2.5}$ and NO_X emissions by 2025, either through implementation of these listed measures or through implementation of other control measures that achieve the necessary amounts of emission reductions by 2025.[291]

The 2018 $PM_{2.5}$ Plan discusses a number of additional control measures that the District may adopt to meet its aggregate tonnage commitment, including additional control requirements for flares; boilers, steam generators, and process heaters of various sizes; glass melting furnaces; internal combustion engines; conservation management practices for agricultural operations; and commercial under-fired charbroilers.[292] In addition, the Plan states that the District intends to use incentive programs to reduce emissions of direct $PM_{2.5}$ and NO_X from internal combustion engines used in agricultural operations, commercial under-fired charbroilers, and residential woodburning devices.[293] The 2018 $PM_{2.5}$ Plan establishes deadlines between 2018 and 2023 for CARB to take action on and begin implementing the 15 additional mobile source control measures that CARB has committed to propose to its Board[294] and similar deadlines between 2019 and 2024 for the District to take action on and begin implementing the 12 additional District control measures that the District has committed to propose to its Board.[295]

The anticipated implementation schedule for new CARB measures is presented in Table 4–8 of the 2018 $PM_{2.5}$ Plan and the anticipated implementation schedule for new District measures is presented both in Table H–2 of Appendix H and in Tables 4–4 and 4–5 of the 2018 $PM_{2.5}$ Plan. We summarize these schedules, as well as the compliance schedules for those District measures that have been adopted by December 2021, in Table IV–A (for CARB measures) and Table IV–B (for District measures) of the EPA's 2012 Annual $PM_{2.5}$ TSD. For example, implementation of Rule 4901 began November 1, 2019, and implementation for Rules 4311, 4306, 4320, and 4702 will begin December 31, 2023.

Section H.1.3 of Appendix H of the Plan provides the State's and District's justifications for the stepwise approach to meeting the RFP requirement and the related implementation schedules for new or revised control measures. These justifications include the time needed to engage in the rulemaking process, including time for state and local public processes; the need to provide time for industry to comply with new regulatory requirements; the need to resolve feasibility issues for emerging technologies; and, for CARB mobile source measures, the need for affected industries to prepare technologies and infrastructure for market-scale adoption.

For example, Appendix H of the 2018 $PM_{2.5}$ Plan states that ''time after rule adoption will be necessary for unit manufacturers and vendors to make available compliant equipment, and for facility operators to source, purchase, and install new units or compliant retrofit equipment. Dependent on the source category, construction of controls will include engineering, site preparation and infrastructure upgrades, unit installation, and operator training on proper operation.''[296]

CARB and the District discussed in greater detail a number of specific implementation challenges as part of their justification for meeting the RFP requirement by the stepwise approach in the Plan. For NO_X, the new control measures that CARB and the District anticipate implementing toward the end of the attainment period can be found in tables 4–4, 4–5, and 4–8 of the 2018 $PM_{2.5}$ Plan. Appendix H of the 2018 $PM_{2.5}$ Plan provides the following explanation for the need to implement the listed measures in a stepwise manner:

''The objective of many of CARB's new measures is to introduce or advance innovative technologies in early stages of development or market penetration. In the case of technology-forcing regulations, . . . time is needed by the affected industry to ready the technologies, including infrastructure, for market-scale adoption, and would have been discussed previously by CARB and stakeholders during the measure development phase. The time required to facilitate new and innovative technologies is a principle driver of the timeline for control measure implementation CARB laid out in Table 4–8.''[297]

CARB provided more specific information regarding two of these measures on pages H–9 and H–10 of Appendix H. For instance, the development of Heavy-Duty I/M was affirmed by California legislative action in 2019, and CARB was working on program design and infrastructure to implement new legislative direction.[298] For the California Low-NO_X Engine Standard, the implementation timeline has been influenced by a multi-year research program to assess the feasibility of this standard. The development of these measures has now culminated in adoption of Heavy-Duty I/M in December 2021 and the California Low-NO_X Engine Standard in August 2020, with implementation beginning in 2023 and 2024, respectively.

The new direct $PM_{2.5}$ measures that CARB and the District anticipate implementing toward the end of the attainment period can be found in Tables 4–4, 4–5, and 4–8 of the 2018 $PM_{2.5}$ Plan. CARB's additional measures are expected to achieve 0.9 tpd of direct

[288] 2018 $PM_{2.5}$ Plan, App. B and App. C.

[289] 2018 $PM_{2.5}$ Plan, Chapter 4, Table 4–8 and CARB Resolution 18–49, 5. Table 4–8 of the 2018 $PM_{2.5}$ Plan lists 14 State regulatory measures, but we are excluding from our review the ACC 2 measure and the ''Cleaner In-Use Agricultural Equipment'' measure because these measures are scheduled for implementation in 2026 and 2030, respectively, which fall after the January 1, 2025 implementation deadline for control measures necessary for attainment by December 31, 2025. 40 CFR 51.1011(b)(5).

[290] 2018 $PM_{2.5}$ Plan, Chapter 4, Table 4–4 and SJVUAPCD Governing Board Resolution 18–11–16, 10–11.

[291] SJVUAPCD Governing Board Resolution 18–11–16, 10–11 and CARB Resolution 18–49, 5.

[292] 2018 $PM_{2.5}$ Plan, Chapter 4, 4–12 and 4–15 to 4–22.

[293] Id. at 4–22 to 4–24.

[294] 2018 $PM_{2.5}$ Plan, Chapter 4, Table 4–8 and CARB Resolution 18–49, 5.

[295] 2018 $PM_{2.5}$ Plan, tables 4–4 and 4–5, and SJVUAPCD Governing Board Resolution 18–11–16, 10–11.

[296] 2018 $PM_{2.5}$ Plan, App. H, H–7.

[297] 2018 $PM_{2.5}$ Plan, App. H, H–8.

[298] California Senate Bill 210, signed September 20, 2019.

$PM_{2.5}$ emission reductions [299] and the District's additional measures are expected to achieve 1.3 tpd of direct $PM_{2.5}$ emission reductions by 2025.[300] New or revised District measures are thus expected to achieve a significant portion of CARB and the District's 2.2 tpd direct $PM_{2.5}$ emission reduction commitment for the 2025 attainment year.

As discussed in section IV.F.3.c of this proposed rule, CARB and the District have adopted 18 measures of the 27 control measure commitments, a majority of which will achieve direct $PM_{2.5}$ emission reductions in the SJV. In doing so, CARB and the District concurrently developed and adopted measures for wide-ranging emission sources such as heavy-duty trucks, agricultural equipment, local trucks, small off-road engines, flares, boilers, stationary internal combustion engines, and residential wood burning.

With respect to the commercial charbroiling, according to information provided in Appendix C of the 2018 $PM_{2.5}$ Plan, the costs associated with retrofitting control technology onto equipment at existing restaurants and maintaining such equipment can be prohibitively expensive, especially for smaller restaurants.[301] Because of ongoing uncertainties about the technological and economic feasibility of controls for under-fired charbroiling (UFC), the District adopted a set of registration and reporting provisions in a revised version of Rule 4692 that required owners and operators of commercial cooking operations with UFCs to register each unit and to submit, by January 1, 2019, a one-time informational report providing information about the UFC and its operations. CARB submitted this revised rule to the EPA on November 16, 2018, and the EPA approved the rule amendments into the California SIP on September 14, 2020.[302]

While the District has not proposed to its Governing Board amendments to Rule 4692 that impose new control requirements on UFCs, in presenting the District's ''Commercial Underfired Charbroiling Emission Reduction Strategy'' to its Governing Board on December 17, 2020, the District expressed continued difficulty in identifying feasible control technologies for under-fired charbroiling restaurants, particularly given the ''unprecedented impacts of the COVID–19 pandemic to the restaurant industry'' that limited revenue streams.[303] Nevertheless, the District continues to work on this source category, including the evaluation of ''potential amendments to Rule 4692 in the near future.'' [304]

The 2018 $PM_{2.5}$ Plan also shows that a portion of the necessary direct $PM_{2.5}$ emission reductions in 2025 (0.32 of 2.2 tpd) is expected to result from a revised version of the District's Conservation Management Practices (CMP) rule (Rule 4550), which is designed to reduce particulate emissions from agricultural operations.[305] The District hosted a public scoping meeting on potential amendments to Rule 4550 on December 16, 2021,[306] and anticipates proposing this revised rule to the SJVUAPCD Governing Board in 2022 and implementing it beginning in 2024.[307] As explained in Appendix C of the 2018 $PM_{2.5}$ Plan, an important step in developing effective $PM_{2.5}$ controls for dust from agricultural operations is to develop an understanding of the effectiveness of CMPs on controlling $PM_{2.5}$ emissions in the Valley.[308] Towards this end, the District intends to work with stakeholders and researchers to evaluate the feasibility and effectiveness of additional control measures to reduce $PM_{2.5}$ emissions, including: Tilling and other land preparation activities; selection of conservation tillage as a CMP for croplands; and CMPs on fallow lands that are tilled or otherwise worked with implements of husbandry (*e.g.,* a farm tractor drawing a trailer with crops) to reduce windblown PM emissions from disturbed fallowed acreage.[309]

(b) Quantitative Milestones

Appendix H of the 2018 $PM_{2.5}$ Plan identifies October 15 milestone dates for the 2019 and 2022 RFP milestone years, the 2025 attainment year, and a post-attainment milestone year of 2028.[310] Appendix H also identifies target emissions levels to meet the RFP requirement for direct $PM_{2.5}$ and NO_X emissions for each of these milestone years,[311] as shown in Table 6 of this proposed rule, and control measures that CARB and the District plan to implement by each of these years, in accordance with the control strategy in the Plan.[312]

We note, however, that while quantitative milestones are required for 2019 in the context of the Moderate area plan for the 2012 annual $PM_{2.5}$ NAAQS in the SJV (corresponding to the 4.5 years after the date of designation), we have already evaluated and approved the State's quantitative milestones for 2019, as supplemented by the 2018 $PM_{2.5}$ Plan.[313] Therefore, the EPA is not evaluating the 2019 milestones for purposes of the State's Serious area plan for the 2012 annual $PM_{2.5}$ NAAQS in the SJV. Similarly, given that the 2018 $PM_{2.5}$ Plan includes a demonstration of attainment by the 10th calendar year following designations, quantitative milestones are not required beyond 10.5 years after the date of designation (*i.e.,* October 15, 2025). Therefore, the EPA is not evaluating the 2028 milestones for purposes of the submitted Serious area plan.

The 2018 $PM_{2.5}$ Plan estimates that emissions of direct $PM_{2.5}$ and NO_X will generally decline from the 2013 base year to the 2025 attainment year and that direct $PM_{2.5}$ and NO_X are emitted by a large number and range of sources in the SJV. With respect to emission reductions, the 2018 $PM_{2.5}$ Plan relies on the baseline measures reflected in the Plan's emissions inventory to demonstrate RFP through 2022.[314]

In addition to these baseline measures, the 2018 $PM_{2.5}$ Plan's control strategy includes specific control measure commitments for purposes of attaining the 2012 annual $PM_{2.5}$ NAAQS by 2025, including commitments by CARB and the District to develop and propose to their respective boards specific regulatory and incentive-based measures identified in the plan by specific years leading up to 2025, including 2019 and 2022.[315] Although

[299] 2018 $PM_{2.5}$ Plan, Ch. 4, Table 4–9.

[300] Id. at Table 4–3. As discussed in section IV.F.3.d of this proposed rule, pending final approval of the Agricultural Burning Phase-out Measure, the District would have met its direct $PM_{2.5}$ emission reduction commitment of 1.3 tpd and, in fact, exceeded it by 0.13 tpd.

[301] 2018 $PM_{2.5}$ Plan, App. C, C–209 to C–210.

[302] 85 FR 56521.

[303] SJVUAPCD, ''Item Number 11: Adopt Proposed Commercial Under-fired Charbroiling Emission Reduction Strategy,'' December 17, 2020, 2.

[304] 2021 Progress Report, 9.

[305] 2018 $PM_{2.5}$ Plan, Ch. 4, Table 4–3.

[306] SJVUAPCD, ''Notice of Public Scoping Meeting, Rule 4550 (Conservation Management Practices),'' December 2, 2021. The District also held a series of workshops from January to March 2020 with the stated goal of ''assisting growers and dairy families in understanding and complying with District Rule 4550.'' SJVUAPCD, ''Air Quality Workshop Series Focused on Conservation Management Practices (CMP) Plans,'' available at *https://www.valleyair.org/Workshops/postings/2020/2020_CMP/notice.pdf.*

[307] 2018 $PM_{2.5}$ Plan, Ch. 4, Table 4–4.

[308] 2018 $PM_{2.5}$ Plan, App. C, C–203.

[309] Id. at C–203.

[310] 2018 $PM_{2.5}$ Plan, App. H, Table H–12.

[311] Id. at Table H–5.

[312] Id. at H–23 to H–24 (for CARB milestones) and H–20 to H–22 (for District milestones).

[313] 86 FR 67343, 67346.

[314] 2018 $PM_{2.5}$ Plan, App. H, H–4 to H–15.

[315] CARB Resolution 18–49, 5; 2018 $PM_{2.5}$ Plan, Ch. 4, Table 4–8; email dated November 12, 2019, from Sylvia Vanderspek, CARB to Anita Lee, EPA Region IX, ''RE: SJV $PM_{2.5}$ information'' (attaching ''Valley State SIP Strategy Progress''); CARB 2018

Continued

the attainment demonstration does not rely on these control measure commitments for emission reductions until 2025,[316] the RFP and quantitative milestone elements of the 2018 $PM_{2.5}$ Plan rely on these control measure commitments to demonstrate that the plan requires RFP toward attainment.[317]

For the 2022 milestone year, Appendix H of the 2018 $PM_{2.5}$ Plan describes the District's quantitative milestone as a report on ''[t]he status of SIP measures adopted between 2019 and 2022 as per the schedule included in the adopted Plan, including *Residential Wood Burning Strategy* and *Commercial Under-Fired Charbroiler* incentive-based strategy.'' [318] The schedule for development of new or revised SIP measures in the 2018 $PM_{2.5}$ Plan identifies ''action dates'' between 2019 and 2022 for 12 District measures listed in tables 4–4 and 4–5 of Chapter 4, including, for example, Rule 4311 (''Flares''), Rule 4702 (''Internal Combustion Engines'') and Rule 4354 (''Glass Melting Furnaces'').[319]

Appendix H describes CARB's quantitative milestone as a report on two measure-specific milestones: (1) Actions taken between 2019 and 2022 to implement the Truck and Bus Regulation that required particulate filters and cleaner engine standards on existing heavy-duty diesel trucks and buses in California, and (2) the ''status of SIP measures adopted between 2019 and 2022, including *Advanced Clean Cars 2* and the *Heavy-Duty Vehicle Inspection and Maintenance Program.*'' [320] The schedule for development of new or revised CARB measures in the 2018 $PM_{2.5}$ Plan identifies ''action'' dates between 2019 and 2022 for 13 CARB measures listed in Table 4–8 of Chapter 4, including, for example, Heavy-Duty I/M, the SORE regulation, and the Low-Emission Diesel Fuel Requirement.[321]

For the 2025 attainment year, Appendix H of the 2018 $PM_{2.5}$ Plan describes the District's quantitative milestone as a report on ''[i]mplementation of amendments to *Residential Wood Burning Strategy,* including any regulatory amendments and enhancements to the District Burn Cleaner incentive program,'' ''[i]mplementation of amendments to the *Commercial Under-Fired [Charbroiler] Strategy,* including any regulatory amendments and implementation of related incentive-based strategy,'' and ''[t]he status of SIP measures adopted between 2022 and 2025 as per the schedule included in the adopted Plan.'' [322] The schedule for development of new or revised SIP control measures in the 2018 $PM_{2.5}$ Plan identifies ''action dates'' between 2022 and 2025 for one District measure: Rule 4550 (''Conservation Management Practices'').[323]

Appendix H describes CARB's quantitative milestone as a report on three measure-specific milestones: (1) ''[i]dentify the number of pieces of agricultural equipment turned over to Tier 4 Final due to the *Accelerated Turnover of Agricultural Tractors Measure* through 2025;'' (2) ''[i]dentify the number of trucks and buses turned over to a low-NO_X engine or cleaner due to the *Accelerated Turnover of Trucks and Buses Measure* through 2025;'' and (3) ''[t]he status of SIP measures adopted between 2022 and 2025, including the *proposed Cleaner In-Use Agricultural Equipment Measure* to incentivize the penetration of cleaner agricultural equipment used in California.'' [324] The schedule for development of new or revised CARB measures in the 2018 $PM_{2.5}$ Plan identifies ''action'' dates between 2022 and 2025 for one CARB measure: The Cleaner In-Use Agricultural Equipment measure.[325]

3. EPA Evaluation and Proposed Action

(a) Reasonable Further Progress

We have evaluated the RFP demonstration in Appendix H of the 2018 $PM_{2.5}$ Plan and, for the following reasons, propose to find that it satisfies the statutory and regulatory requirements for RFP. First, the Plan contains an anticipated implementation schedule for the attainment control strategy, including all BACM and BACT control measures and CARB and the District's aggregate tonnage commitments, as required by 40 CFR 51.1012(a)(1). The implementation schedule is found in Tables 4–4, 4–5, and 4–8 of the 2018 $PM_{2.5}$ Plan and in Table H–2 of Appendix H. The 2018 $PM_{2.5}$ Plan documents the State's and District's conclusion that they are implementing all BACM and BACT for direct $PM_{2.5}$ and NO_X emissions in the Valley as expeditiously as practicable.[326]

Second, the RFP demonstration contains projected emission levels for direct $PM_{2.5}$ and NO_X for each applicable milestone year as required by 40 CFR 51.1012(a)(2). These projections are based on continued implementation of the existing control measures in the area (*i.e.,* baseline measures) and commitments to achieve additional reductions from new measures by 2025, and reflect full implementation of the State's, District's, and MPOs' attainment control strategy for these pollutants.

Third, the projected emissions levels based on the implementation schedule in the Plan demonstrate that the control strategy will achieve reasonable further progress toward attainment between the 2013 baseline year and the 2025 attainment year as required by 40 CFR 51.1012(a)(3). Tables 7 and 8 of this proposed rule show decreases in emissions levels in each milestone year, leading to the achievement of the reductions required for attainment in 2025.

Staff Report, 14; SJVUAPCD Governing Board Resolution 18–11–16, 10–11; 2018 $PM_{2.5}$ Plan, Ch. 4, tables 4–4 and 4–5; and email dated November 12, 2019, from Jon Klassen, SJVUAPCD to Wienke Tax, EPA Region IX, ''RE: follow up on aggregate commitments in SJV $PM_{2.5}$ plan'' (attaching ''District Progress in Implementing Commitments with 2018 $PM_{2.5}$ Plan'').

[316] 2018 $PM_{2.5}$ Plan, Ch. 4, Table 4–3 (''Emission Reductions from District Measures'') and Table 4–9 (''San Joaquin Valley Expected Emission Reductions from State Measures'').

[317] 2018 $PM_{2.5}$ Plan, App. H, H–4 to H–10 (describing commitments by CARB and SJVUAPCD to adopt additional measures to fulfill tonnage commitments for 2024 and 2025, including ''action'' and ''implementation'' dates occuring before 2024 to ensure expeditious progress toward attainment).

[318] 2018 $PM_{2.5}$ Plan, App. H, H–20.

[319] 2018 $PM_{2.5}$ Plan, Ch. 4, 4–12 and 4–13 (tables 4–4 and 4–5). See also email dated November 12, 2019, from Jon Klassen, SJVUAPCD to Wienke Tax, EPA Region IX, ''RE: follow up on aggregate commitments in SJV $PM_{2.5}$ plan'' (attaching ''District Progress in Implementing Commitments with 2018 $PM_{2.5}$ Plan,'' stating the District's intent to take action on the listed rules and measures by beginning the public process on each measure and then proposing the rule or measure to the SJVUAPCD Governing Board).

[320] 2018 $PM_{2.5}$ Plan, App. H, H–23.

[321] 2018 $PM_{2.5}$ Plan, Ch. 4, 4–28 (Table 4–8). See also email dated November 12, 2019, from Sylvia Vanderspek, CARB to Anita Lee, EPA Region IX, ''RE: SJV $PM_{2.5}$ information'' (attaching ''Valley State SIP Strategy Progress'') and CARB 2018 Staff Report, 14–15 (stating CARB's intent to ''bring to the Board or take action on the list of proposed State measures for the Valley'' by the action dates specified in Table 2).

[322] 2018 $PM_{2.5}$ Plan, App. H, H–20 to H–21.

[323] 2018 $PM_{2.5}$ Plan, Ch. 4, 4–12 (Table 4–4). See also email dated November 12, 2019, from Jon Klassen, SJVUAPCD to Wienke Tax, EPA Region IX, ''RE: follow up on aggregate commitments in SJV $PM_{2.5}$ plan'' (attaching ''District Progress in Implementing Commitments with 2018 $PM_{2.5}$ Plan,'' stating the District's intent to take action on the listed rules and measures by beginning the public process on each measure and then proposing the rule or measure to the SJVUAPCD Governing Board).

[324] 2018 $PM_{2.5}$ Plan, App. H, H–23.

[325] 2018 $PM_{2.5}$ Plan, Ch. 4, 4–28 (Table 4–8). See also email dated November 12, 2019, from Sylvia Vanderspek, CARB to Anita Lee, EPA Region IX, ''RE: SJV $PM_{2.5}$ information'' (attaching ''Valley State SIP Strategy Progress'') and CARB 2018 Staff Report, 14–15 (stating CARB's intent to ''bring to the Board or take action on the list of proposed State measures for the Valley'' by the action dates specified in Table 2).

[326] The BACM/BACT control strategy that provides the basis for these emissions projections is described in Chapter 4, App. C, and App. D of the 2018 $PM_{2.5}$ Plan.

Finally, the RFP demonstration shows that overall pollutant emissions will be at levels that reflect stepwise progress between the base year and the attainment year and provides a justification for the selected implementation schedule, as required by 40 CFR 51.1012(a)(4). The steeper decline in emissions by 2025 is primarily due to commitments by CARB and the District to achieve reductions from new control measures by 2025. CARB and the District's justifications for their selected implementation schedules, *i.e.,* for the delay in their respective commitments to achieve emissions reductions from new or revised control measures, include the time needed for rulemaking processes, the time needed for industry to comply with new regulatory requirements, the need to resolve feasibility issues for emerging technologies, and the time needed to prepare technologies and infrastructure for market-scale adoption.

We note that although both CARB and the District have committed to propose to their respective boards certain new or revised control measures in the years leading up to the 2025 attainment year, the only enforceable commitment in the Plan that requires adoption of control measures is the tonnage commitment for reductions by 2025, which provides the basis for the stepwise approach to RFP.

(b) Quantitative Milestones

Appendix H of the 2018 $PM_{2.5}$ Plan identifies milestone dates for the Serious plan (*i.e.,* October 15, 2022, and October 15, 2025) that are consistent with the requirements of 40 CFR 51.1013(a)(2)(i) and target emissions levels for direct $PM_{2.5}$ and NO_X to be achieved by these milestone dates through implementation of the Plan's control strategy. These target emission levels and associated control requirements provide for objective evaluation of the area's progress towards attainment of the 2012 annual $PM_{2.5}$ NAAQS.

CARB's quantitative milestones in Appendix H are to take action on or to implement specific measures listed in the State's control measure commitments that apply to heavy-duty trucks and buses, light-duty vehicles, and non-road equipment sources and may provide substantial reductions in emissions of direct $PM_{2.5}$ and NO_X from mobile sources in the SJV. Similarly, the District's quantitative milestones in Appendix H are to take action on or to implement specific measures listed in the District's control measure commitments that apply to sources such as residential wood burning, conservation management practices, glass melting furnaces, and internal combustion engines and that may provide substantial reductions in emission of direct $PM_{2.5}$ and NO_X from stationary sources. These milestones provide an objective means for tracking CARB and the District's progress in implementing their respective control measure and aggregate tonnage commitments and, thus, provide for objective evaluation of the SJV's progress toward timely attainment.

For these reasons, we propose to determine that the SJV $PM_{2.5}$ Plan satisfies the requirements for quantitative milestones in CAA section 189(c) and 40 CFR 51.1013 for the 2012 annual $PM_{2.5}$ NAAQS in the SJV.

We note that on January 13, 2020, CARB submitted the ''2019 Quantitative Milestone Report for the 2012 $PM_{2.5}$ NAAQS (''SJV 2019 QM Report'') for the Moderate area plan to the EPA,[327] which the EPA is currently reviewing.

H. Contingency Measures

1. Requirements for Contingency Measures

Under CAA section 172(c)(9), states required to make an attainment plan SIP submission must include contingency measures that they will implement if the area fails to meet RFP (''RFP contingency measures'') or fails to attain the NAAQS by the applicable attainment date (''attainment contingency measures''). Under the $PM_{2.5}$ SIP Requirements Rule, states must include contingency measures that will be implemented following a determination by the EPA that the state has failed: (1) To meet any RFP requirement in the approved attainment plan; (2) to meet any quantitative milestone in the approved attainment plan; (3) to submit a required quantitative milestone report; or (4) to attain the applicable $PM_{2.5}$ NAAQS by the applicable attainment date.[328] Contingency measures must be fully adopted rules or control measures that are ready to be implemented quickly and without significant further action by the state or the EPA upon failure to meet RFP or failure of the area to meet the relevant NAAQS by the applicable attainment date.[329]

The purpose of contingency measures is to continue progress in reducing emissions while a state revises its SIP to meet the missed RFP requirement or to correct ongoing nonattainment. Neither the CAA nor the EPA's implementing regulations establish a specific amount of emission reductions that implementation of contingency measures must achieve, but the EPA recommends that contingency measures should provide for emission reductions equivalent to approximately one year of reductions needed for RFP in the nonattainment area, calculated as the overall level of reductions needed to demonstrate attainment divided by the number of years from the base year to the attainment year. In general, we expect all actions needed to effect full implementation of the measures to occur within 60 days after the EPA notifies the state of a failure to meet RFP or to attain.[330]

To satisfy the requirements of 40 CFR 51.1014, the contingency measures adopted as part of a $PM_{2.5}$ attainment plan must consist of control measures for the area that are not otherwise required to meet other attainment plan requirements (*e.g.,* to meet RACM/RACT requirements) and must specify the timeframe within which their requirements become effective following any of the EPA determinations specified in 40 CFR 51.1014(a). To meet CAA section 172(c)(9), contingency measures must be measures that are triggered and implemented only after the EPA determines that an area fails to meet RFP requirements or to attain by the applicable attainment date, and the state must not have begun to implement such measures before this determination is made. Thus, already-implemented measures cannot serve as contingency measures under CAA section 172(c)(9).[331]

2. Summary of State's Submission

The 2018 $PM_{2.5}$ Plan addresses the contingency measure requirement for the 2012 annual $PM_{2.5}$ NAAQS by reference to the contingency measure portion of a separate December 2018 SIP submission that involved enhanced enforcement of CARB regulations in the SJV, a commitment to amend the District's residential wood burning rule (*i.e.,* District Rule 4901) to include contingent provisions, and emissions estimates for the year following the attainment year for use in evaluating whether the emissions reductions from the contingency measures are

[327] Letter dated January 13, 2020, from Richard W. Corey, Executive Officer, CARB, to Mike Stoker, Regional Administrator, EPA Region IX, with enclosures.

[328] 40 CFR 51.1014(a).

[329] 81 FR 58010, 58066 and General Preamble Addendum, 42015.

[330] 81 FR 58010, 58066. See also General Preamble 13512, 13543–13544, and General Preamble Addendum, 42014–42015.

[331] See *Bahr* v. *EPA,* 836 F.3d 1218, 1235 (9th Cir. 2016), *Sierra Club* v. *EPA,* 985 F.3d 1055 (DC Cir. 2021), and *Assoc. of Irritated Residents* v. *EPA,* 10 F.4th 937 (9th Cir. 2021).

sufficient.[332] In January 2021, CARB withdrew the enhanced enforcement portion of the December 2018 SIP submission as it pertained to the 2012 annual $PM_{2.5}$ NAAQS in the SJV.[333]

With respect to the District contingency measure, the 2018 $PM_{2.5}$ Plan states that the District will amend District Rule 4901 to include a requirement that would be triggered should the EPA issue a final rulemaking that the SJV failed to meet a regulatory requirement necessitating implementation of a contingency measure.[334] The District adopted amendments to Rule 4901 on June 20, 2019, including a contingency measure in section 5.7.3 of the amended rule, and CARB submitted the amended rule to the EPA for approval on July 22, 2019.[335] In this proposal, we are evaluating District Rule 4901, specifically, section 5.7.3, for compliance with the requirements for contingency measures for purposes of meeting the Serious area planning requirements for the 2012 annual $PM_{2.5}$ NAAQS.

District Rule 4901 is designed to limit emissions generated by the use of wood burning fireplaces, wood burning heaters, and outdoor wood burning devices. The rule establishes requirements for the sale/transfer, operation, and installation of wood burning devices and for advertising the sale of seasoned wood consistent with a moisture content limit within the SJV.

The rule includes a two-tiered, episodic wood burning curtailment requirement that applies during four winter months, November through February. During a level one episodic wood burning curtailment, section 5.7.1 prohibits any person from operating a wood burning fireplace or unregistered wood burning heater but permits the use of a properly operated wood burning heater that meets certification requirements and has a current registration with the District. Sections 5.9 through 5.11 impose specific registration requirements on any person operating a wood burning fireplace or wood burning heater and section 5.12 imposes specific certification requirements on wood burning heater professionals. During a level two episodic wood burning curtailment, operation of any wood burning device is prohibited by section 5.7.2.

Prior to the 2019–2020 wood burning season, the District imposed a level one curtailment when the $PM_{2.5}$ concentration was forecasted to be between 20–65 $\mu g/m^3$ and imposed a level two curtailment when the $PM_{2.5}$ concentration was forecasted to be above 65 $\mu g/m^3$ or the PM_{10} concentration was forecasted to be above 135 $\mu g/m^3$. In 2019, the District adopted revisions to Rule 4901 to lower the wood burning curtailment thresholds in the ''hot spot'' counties of Madera, Fresno, and Kern. The District lowered the level one $PM_{2.5}$ threshold for these three counties from 20 $\mu g/m^3$ to 12 $\mu g/m^3$, and the level two $PM_{2.5}$ threshold from 65 $\mu g/m^3$ to 35 $\mu g/m^3$. The District did not modify the curtailment thresholds for other counties in the SJV—those levels remained at 20 $\mu g/m^3$ for level one and 65 $\mu g/m^3$ for level two.

The District's 2019 revision to Rule 4901 also included the addition of a contingency measure in section 5.7.3 of the rule, requiring that 60 days following the effective date of an EPA final rulemaking that the SJV has failed to attain the 1997, 2006, or 2012 $PM_{2.5}$ NAAQS by the applicable attainment date, the $PM_{2.5}$ curtailment levels for any county that has failed to attain the applicable standard will be lowered to the curtailment levels in place for hot spot counties. The District estimates that the potential emissions reduction in direct $PM_{2.5}$ would be in the range of 0.014 tpd (if the contingency is triggered in Kings County but not the other non-hot-spot counties) to 0.387 tpd (if the contingency is triggered in all five of the non-hot-spot counties), but there would be no emissions reduction if, at the time of the determination of failure to attain the 2012 annual $PM_{2.5}$ NAAQS by the attainment date, violations of the 2012 annual $PM_{2.5}$ NAAQS occurred only at monitors in the hot-spot counties.[336] The corresponding potential NO_X emissions reduction would be in the range of 0.002 tpd to 0.060 tpd, respectively, but as previously noted there would be no emissions reduction if the monitored violations occur in the hot-spot counties only.[337]

3. EPA Evaluation and Proposed Action

We have evaluated the contingency measure element of the 2018 $PM_{2.5}$ Plan and associated contingency measure in District Rule 4901 (*i.e.,* section 5.7.3 of the rule) against the requirements of CAA section 172(c)(9) and 40 CFR 51.1014 for both attainment and RFP contingency measures, and the related requirements for submission of quantitative milestone reports and compliance with quantitative milestones. We propose to find that the contingency measure element of the 2018 $PM_{2.5}$ Plan (and contingency measure in District Rule 4901) is inadequate to meet the Serious area contingency measure requirements for the 2012 annual $PM_{2.5}$ NAAQS for several reasons.

As noted in our summary of the State's submission, the contingency measure in District Rule 4901 is structured to provide for implementation if the area fails to attain the 2012 annual $PM_{2.5}$ NAAQS, not before, and is therefore consistent with the requirement under CAA section 172(c)(9) that contingency measures be prospective and conditional, rather than already being implemented. However, as structured, the contingency measure of Rule 4901 (*i.e.,* section 5.7.3) would provide for emissions reductions only in Kings, Merced, San Joaquin, Stanislaus, and/or Tulare counties, not the ''hot spot'' counties of Fresno, Kern, and Madera, and only if a violating monitoring site (*i.e.,* a site where the collected data represent a violation of the NAAQS) is located in such county. In other words, if the EPA's determination of failure to attain the NAAQS by the applicable attainment date indicates violations at monitoring sites in Fresno and Kern (''hot spot'' counties) and Tulare (non-hot-spot county) counties, the contingency measure would provide for emissions reductions by lowering the wood burning curtailment thresholds in Tulare County only. The ''hot spot'' counties are already subject to the lower wood burning curtailment thresholds in the rule and thus would not be affected by the finding of failure to attain determination and the other non-''hot spot'' counties (*i.e.,* other than Tulare County in this example) would not be subject to the lower wood burning curtailment thresholds.

In accordance with 40 CFR 51.1014, the contingency measure in District Rule 4901 identifies a specific triggering mechanism. In this case, the triggering mechanism in the rule is the EPA's final determination that the SJV has failed to attain the 2012 annual $PM_{2.5}$ NAAQS by

[332] 2018 $PM_{2.5}$ Plan, App. H (revised February 11, 2020), H–24 to H–26.

[333] Letter dated January 8, 2021, from Richard W. Corey, Executive Officer, CARB, to John W. Busterud, Regional Administrator, EPA Region IX, with enclosures.

[334] 2018 $PM_{2.5}$ Plan, App. H, H–25.

[335] SJVUAPCD Rule 4901, as amended on June 20, 2019, was submitted electronically to the EPA on July 22, 2019, as an attachment to a letter dated July 19, 2019, from Richard W. Corey, Executive Officer, CARB, to Mike Stoker, Regional Administrator, EPA Region IX.

[336] See Table B–13 in Appendix B from the District's Final Staff Report (June 20, 2019) for revisions to Rule 4901.

[337] NO_X emissions reductions from the contingency measure are based on the District's estimates for direct $PM_{2.5}$ emissions using the ratio of direct $PM_{2.5}$ to NO_X in Table 1 of the District's Final Staff Report (June 20, 2019) for revisions to Rule 4901.

the applicable attainment date.[338] The rule also specifies a timeframe within which its requirements become effective after a failure-to-attain determination (*i.e.,* on and after 60 days from the effective date of the EPA's final determination), and would take effect with minimal further action by the state or the EPA. However, the contingency measure in District Rule 4901 does not address the potential for State failures to meet a quantitative milestone, submit a quantitative milestone report, or failure to meet an RFP requirement.[339]

In addition, the contingency measure provision of Rule 4901 is not structured to achieve any additional emissions reductions if the EPA finds that monitoring locations in the ''hot spot'' counties (*i.e.,* Fresno, Kern, or Madera Counties) are the only ones in the SJV that are violating the 2012 annual $PM_{2.5}$ NAAQS as of the attainment date. To qualify as a contingency measure, a measure must be structured to achieve emissions reductions if triggered, and the contingency measure of District Rule 4901 provides for such reductions only under certain circumstances. If the District intends to retain a contingency provision in Rule 4901, the District should revise the rule to provide for additional emissions reductions in the SJV (if triggered) regardless of which monitoring site(s) is determined to be violating the 2012 annual $PM_{2.5}$ NAAQS as of the attainment date.[340]

Next, we considered the adequacy of the contingency measure in section 5.7.3 of District Rule 4901 from the standpoint of the magnitude of emissions reductions the measure would provide if triggered. Neither the CAA nor the EPA's implementing regulations for the $PM_{2.5}$ NAAQS establish a specific amount of emissions reductions that implementation of contingency measures must achieve, but the EPA has long recommended that contingency measures should provide for emissions reductions approximately equivalent to one year's worth of RFP, which in the case of the Serious area attainment plan amounts to reductions of approximately 0.5 tpd of direct $PM_{2.5}$ and 17.3 tpd of NO_X for the 2012 annual $PM_{2.5}$ NAAQS in the SJV.[341] As noted in our summary of the State's submission, the emissions reductions from the contingency measure in District Rule 4901 would amount to approximately 0.00 tpd to 0.387 tpd of direct $PM_{2.5}$, which equates to approximately 0% to 77% of one year's worth of RFP for direct $PM_{2.5}$. With respect to NO_X emissions reductions, the contingency measure in District Rule 4901 would amount to approximately 0.00 tpd to 0.06 tpd, which equates to approximately 0% to 0.3% of one year's worth of RFP for NO_X. As such, the emissions reductions from the contingency measure in section 5.7.3 of Rule 4901, if triggered, would be far less than one year's worth of progress with respect to the 2012 annual $PM_{2.5}$ NAAQS in the SJV. District Rule 4901 alone, and as currently formulated, would provide insufficient emission reductions to meet the contingency measures requirement.

For these reasons, we propose to disapprove the contingency measure element of the 2018 $PM_{2.5}$ Plan (and the related contingency measure in District Rule 4901) under CAA section 179(c)(9) and 40 CFR 51.1014 with respect to the Serious area planning requirements for the 2012 annual $PM_{2.5}$ NAAQS in the SJV. While the contingency measure provision of the 2019 amendment to Rule 4901 has an adequate triggering mechanism for failure to attain, we propose to disapprove it because it may result in no emissions reductions if the area fails to attain the NAAQS by the applicable attainment date. Furthermore, because the contingency measure element and the contingency measure of Rule 4901 lack any to-be-triggered measure for failure to meet a quantitative milestone, failure to submit a quantitative milestone report, or failure to meet an RFP requirement, we propose that the submissions are also inadequate with respect to the RFP contingency measure requirements. Lastly, the contingency measure element, and the associated contingency measure in District Rule 4901, fail to provide emissions reductions roughly equivalent to one year's worth of progress or to provide an adequate reasoned justification why a smaller amount of emissions reductions is appropriate.[342]

If the EPA finalizes the proposed disapproval of the contingency measure element for the 2012 annual $PM_{2.5}$ NAAQS and finalizes approval of the Plan's RFP demonstration, modeled attainment demonstration, and motor vehicle emissions budgets, the area would be eligible for a protective finding under the transportation conformity rule because the 2018 $PM_{2.5}$ Plan reflects adopted control measures and contains enforceable commitments that fully satisfy the emissions reductions requirements for RFP and attainment for the 2012 annual $PM_{2.5}$ NAAQS.[343]

I. Motor Vehicle Emission Budgets

1. Requirements for Motor Vehicle Emission Budgets

Section 176(c) of the CAA requires federally funded or approved actions in nonattainment and maintenance areas to conform to the SIP's goals of eliminating or reducing the severity and number of violations of the NAAQS and achieving expeditious attainment of the standards. Conformity to the SIP's goals means that such actions will not: (1) Cause or contribute to new violations of a NAAQS, (2) increase the frequency or severity of an existing violation, or (3) delay timely attainment of any NAAQS or any interim milestone.

Actions involving Federal Highway Administration (FHWA) or Federal Transit Administration (FTA) funding

[338] Section 5.7.3 of Rule 4901 states that ''the District shall notify the public of an Episodic Curtailment for the $PM_{2.5}$ curtailment levels described in Sections 5.7.1.2 and 5.7.2.2 *for any county that has failed to attain the applicable standard.*'' (emphasis added) We interpret this to mean that the District would apply the more stringent curtailment provisions for any county identified in the EPA's final rule making the determination that the SJV failed to attain the applicable $PM_{2.5}$ NAAQS.

[339] We note that section 5.7.3 of District Rule 4901 applies the lower thresholds ''on and after sixty days following the effective date of EPA final rulemaking,'' which is appropriate as a contingency measure trigger for a failure to attain by the applicable attainment date given that the EPA conducts rulemaking to make such determinations. However, for the three other contingency triggers, *i.e.,* State failures to meet a quantitative milestone, submit a quantitative milestone report, or failure to meet an RFP requirement, the EPA may not conduct rulemaking but instead make the determinations through correspondence directly to the State. Thus, we recommend that section 5.7.3 of District Rule 4901 be amended to refer to ''EPA final determinations'' rather than to ''EPA final rulemaking'' if the rule is amended to include the additional contingency measure triggers.

[340] The EPA believes that the most straightforward remedy under these circumstances would be for the District to amend section 5.7.3 of Rule 4901 to extend the lower wood burning curtailment thresholds region-wide if the EPA determines that the area has failed to attain the 2012 annual $PM_{2.5}$ NAAQS by the applicable attainment date.

[341] The calculation of one year's worth of RFP is based on dividing the values in column E of table H–6 of Appendix H (updated February 11, 2020) of the 2018 $PM_{2.5}$ Plan by 12, *i.e.,* the number of years between 2013 and 2025. We consider that the fact that this element focuses only on direct $PM_{2.5}$ and NO_X (and not ammonia, SO_2, and VOC) is acceptable in light of our proposed approval of the precursor demonstration in section IV.B of this proposed rule.

[342] 81 FR 58010, 58067. We note that the 2018 $PM_{2.5}$ Plan includes estimates of surplus emissions reductions from already-implemented measures to support approval of the contingency measure; however, a recent Ninth Circuit decision rejected reliance on surplus emissions reductions from already-implemented measures as the basis for approving a contingency measure element that relied on a contingency measure that would provide far less than one year's worth of progress. See *Assoc. of Irritated Residents* v. *EPA,* 10 F.4th 937 (9th Cir. 2021).

[343] 40 CFR 93.120(a)(3).

or approval are subject to the EPA's transportation conformity rule, codified at 40 CFR part 93, subpart A (''Transportation Conformity Rule''). Under this rule, metropolitan planning organizations (MPOs) in nonattainment and maintenance areas coordinate with state and local air quality and transportation agencies, the EPA, FHWA, and FTA to demonstrate that an area's regional transportation plans (RTP) and transportation improvement programs (TIP) conform to the applicable SIP. This demonstration is typically done by showing that estimated emissions from existing and planned highway and transit systems are less than or equal to the motor vehicle emissions budgets (''budgets'') contained in all control strategy plans applicable to the area. An attainment or maintenance plan for the $PM_{2.5}$ NAAQS should include budgets for the attainment year, each required RFP milestone year, or the last year of the maintenance plan, as appropriate, for direct $PM_{2.5}$ and $PM_{2.5}$ precursors subject to transportation conformity analyses. Budgets are generally established for specific years and specific pollutants or precursors and must reflect all of the motor vehicle control measures contained in the attainment and RFP demonstrations.[344]

Under the $PM_{2.5}$ SIP Requirements Rule, Serious area $PM_{2.5}$ attainment plans must include appropriate quantitative milestones and projected RFP emissions levels for direct $PM_{2.5}$ and all $PM_{2.5}$ plan precursors in each milestone year.[345] For an area designated nonattainment for the 2012 annual $PM_{2.5}$ NAAQS, a Serious area attainment plan that demonstrates attainment by the end of the 10th calendar year following the date of designation must contain quantitative milestones to be achieved no later than 7.5 years and 10.5 years after the date the area was designated nonattainment.[346] Given that the SJV was designated nonattainment for the 2012 annual $PM_{2.5}$ NAAQS effective April 15, 2015, the required Serious area milestone dates for the SJV are October 15, 2022, and October 15, 2025. Given that the 2018 $PM_{2.5}$ Plan includes a demonstration of attainment of these NAAQS by December 31, 2025, the attainment year and the 2025 milestone year coincide.

$PM_{2.5}$ plans should identify budgets for direct $PM_{2.5}$, NO_X, and all other $PM_{2.5}$ precursors for which on-road emissions are determined to significantly contribute to $PM_{2.5}$ levels in the area for each RFP milestone year and the attainment year, if the plan demonstrates attainment. All direct $PM_{2.5}$ SIP budgets should include direct $PM_{2.5}$ motor vehicle emissions from tailpipes, brake wear, and tire wear. With respect to $PM_{2.5}$ from re-entrained road dust and emissions of VOC, SO_2, and/or ammonia, the transportation conformity provisions of 40 CFR part 93, subpart A, apply only if the EPA Regional Administrator or the director of the state air agency has made a finding that emissions of these pollutants within the area are a significant contributor to the $PM_{2.5}$ nonattainment problem and has so notified the MPO and Department of Transportation (DOT), or if the applicable implementation plan (or implementation plan submission) includes any of these pollutants in the approved (or adequate) budget as part of the RFP, attainment, or maintenance strategy.[347]

In addition, transportation conformity requirements apply with respect to emissions of NO_X unless both the EPA Regional Administrator and the director of the state air agency have made a finding that transportation-related emissions of NO_X within the nonattainment area are not a significant contributor to the $PM_{2.5}$ nonattainment problem and have so notified the MPO and DOT, or the applicable implementation plan (or implementation plan submission) does not establish an approved (or adequate) budget for such emissions as part of the RFP, attainment, or maintenance strategy.[348]

It is not always necessary for states to establish motor vehicle emissions budgets for all of the $PM_{2.5}$ precursors. The $PM_{2.5}$ SIP Requirements Rule allows a state to demonstrate that emissions of certain precursors do not contribute significantly to $PM_{2.5}$ levels that exceed the NAAQS in a nonattainment area, in which case the state may exclude such precursor(s) from its control evaluations for the specific NAAQS at issue. If a state successfully demonstrates that the emissions of one or more of the $PM_{2.5}$ precursors from all sources do not contribute significantly to $PM_{2.5}$ levels in the subject area, then it is not necessary to establish motor vehicle emissions budgets for that precursor(s) consistent with the applicability requirements of the transportation conformity regulations (40 CFR 93.102(b)(2)(iv) and (v)).[349]

Additionally, the transportation conformity regulations contain criteria for determining whether emissions of one or more $PM_{2.5}$ precursors are insignificant for transportation conformity purposes.[350] For a pollutant or precursor to be considered an insignificant contributor based on the transportation conformity rule's criteria, the control strategy SIP must demonstrate that it would be unreasonable to expect that such an area would experience enough motor vehicle emissions growth in that pollutant and/or precursor for a NAAQS violation to occur. Insignificance determinations are based on factors such as air quality, SIP-approved motor vehicle control measures, trends and projections of motor vehicle emissions, and the percentage of the total attainment plan emissions inventory for the NAAQS at issue that is comprised of motor vehicle emissions. The EPA's explanation for providing for insignificance determinations is described in the July 1, 2004 revision to the Transportation Conformity Rule.[351]

Transportation conformity trading mechanisms are allowed under 40 CFR 93.124 where a state establishes appropriate mechanisms for such trades. The basis for the trading mechanism is the SIP attainment modeling that establishes the relative contribution of each $PM_{2.5}$ precursor pollutant. The applicability of emission trading between conformity budgets for conformity purposes is described in 40 CFR 93.124(c).

The EPA's process for determining the adequacy of a budget consists of three basic steps: (1) Notifying the public of a SIP submittal; (2) providing the public the opportunity to comment on the budgets during a public comment period; and (3) making a finding of adequacy or inadequacy.[352] The EPA can notify the public by either posting an announcement that the EPA has received SIP budgets on the EPA's adequacy website (40 CFR 93.118(f)(1)), or through a **Federal Register** notice of proposed rulemaking when the EPA reviews the adequacy of an implementation plan budget simultaneously with its review and action on the SIP itself (40 CFR 93.118(f)(2)).

[344] 40 CFR 93.118(e)(4)(v).

[345] 40 CFR 51.1012(a), 51.1013(a)(2).

[346] 40 CFR 51.1013(a)(2)(i).

[347] 40 CFR 93.102(b)(3), 93.102(b)(2)(v), and 93.122(f); see also Conformity Rule preamble at 69 FR 40004, 40031–36 (July 1, 2004).

[348] 40 CFR 93.102(b)(2)(iv).

[349] 81 FR 58010, 58055, 58058, and 58090.

[350] 40 CFR 93.109(f).

[351] 69 FR 40004.

[352] 40 CFR 93.118(f).

Summary of State's Submission

The 2018 $PM_{2.5}$ Plan includes budgets for direct $PM_{2.5}$ and NO_X emissions for the 2019 and 2022 RFP milestone years, the projected attainment year (2025), and one post-attainment year quantitative milestone (2028).[353] The Plan establishes separate direct $PM_{2.5}$ and NO_X subarea budgets for each county, or partial county (for Kern County), in the SJV.[354] CARB calculated the budgets using EMFAC2014,[355] CARB's latest version of the EMFAC model for estimating emissions from on-road vehicles operating in California that was approved by EPA at the time of Plan development, and the latest modeled vehicle miles traveled and speed distributions from the SJV MPOs from the Final 2017 Federal Transportation Improvement Plans, adopted in September 2016. The budgets reflect annual average emissions consistent with the annual averaging period of the 2012 annual $PM_{2.5}$ NAAQS and the 2018 $PM_{2.5}$ Plan's RFP demonstration.

The required budget years applicable to the Serious area plan portion of the 2018 $PM_{2.5}$ Plan for the 2012 annual $PM_{2.5}$ NAAQS are 2022 and 2025. In our previous final rule on the State's Moderate area plan for the 2012 annual $PM_{2.5}$ NAAQS, we approved the budgets for the 2022 RFP milestone year and, therefore, will not be acting on them again in this action.[356] However, we include them as a reference point, given our discussion of the 2022 year in section IV.G of this proposed rule. Also, while the Plan includes budgets for 2019, consistent with our final rule on the Moderate area plan, we are not evaluating the 2019 budgets because budgets for that year would not be used in any future conformity determination because the plan contains budgets for 2022 and other years in the future, and because they are not required for the submitted Serious area plan.

Furthermore, the EPA would begin the motor vehicle emissions budget adequacy and approval review processes for the 2028 post-attainment milestone year budgets only if the area fails to attain the standard by December 31, 2025 (the applicable Serious area attainment date if the EPA were to finalize approval of the 2018 $PM_{2.5}$ Plan's attainment demonstration). If found adequate or approved, that would result in the 2028 budgets being used in future transportation conformity determinations in any area that needed additional emissions reductions to attain the $PM_{2.5}$ NAAQS.

The direct $PM_{2.5}$ budgets include tailpipe, brake wear, and tire wear emissions but do not include paved road dust, unpaved road dust, and road construction dust emissions.[357] The State did not include budgets for VOC, SO_2, or ammonia. As discussed in section IV.B of this proposed rule, the State submitted a $PM_{2.5}$ precursor demonstration documenting that control of these precursors would not significantly contribute to attainment of the 2012 annual $PM_{2.5}$ NAAQS, and the EPA is proposing to approve the precursor demonstration. Therefore, if the EPA approves the demonstration, consistent with the transportation conformity regulation (40 CFR 93.102(b)(2)(v)), the State would not be required to submit budgets for these precursors. The State also included a discussion of the significance/insignificance factors for ammonia, SO_2, and VOC, which would demonstrate a finding of insignificance under the transportation conformity rule.[358] The State is not required to include re-entrained road dust in the budgets under section 93.103(b)(3) unless the EPA or the State has made a finding that these emissions are significant. Neither the State nor the EPA has made such a finding. The Plan does include a discussion of the significance/insignificance factors for re-entrained road dust.[359] The budgets included in the 2018 $PM_{2.5}$ Plan are shown in Table 9 of this proposed rule.

TABLE 9—MOTOR VEHICLE EMISSION BUDGETS FOR THE SAN JOAQUIN VALLEY FOR THE 2012 $PM_{2.5}$ STANDARD

[Annual average, tpd]

County	2022 (RFP year) [a]		2025 (attainment year)	
	$PM_{2.5}$	NO_X	$PM_{2.5}$	NO_X
Fresno	0.9	21.2	0.8	14.3
Kern	0.8	19.4	0.8	12.8
Kings	0.2	4.1	0.2	2.7
Madera	0.2	3.5	0.2	2.3
Merced	0.3	7.6	0.3	5.0
San Joaquin	0.6	10.0	0.6	6.9
Stanislaus	0.4	8.1	0.4	5.6
Tulare	0.4	6.9	0.4	4.7

Source: 2018 $PM_{2.5}$ Plan, Appendix D, Table 3–3. Budgets are rounded to the nearest tenth of a ton.

[a] The EPA has already approved the 2022 RFP budgets in our final rule on the State's Moderate area plan for the 2012 annual $PM_{2.5}$ NAAQS in the SJV.

In the submittal letter for the 2018 $PM_{2.5}$ Plan, CARB requested that the EPA limit the duration of the approval of the budgets to the period before the effective date of the EPA's adequacy finding for any subsequently submitted budgets.[360]

The 2018 $PM_{2.5}$ Plan also includes a proposed trading mechanism for transportation conformity analyses that would allow future decreases in NO_X emissions from on-road mobile sources to offset any on-road increases in direct $PM_{2.5}$ emissions. In the 2018 $PM_{2.5}$ Plan, the approximate weighting ratios of the precursor emissions for annual average $PM_{2.5}$ formation in equivalent tons per

[353] 2018 $PM_{2.5}$ Plan, App. D, Table 3–3.

[354] 40 CFR 93.124(c) and (d).

[355] EMFAC is short for *EM*ission *FAC*tor. The EPA announced the availability of the EMFAC2014 model for use in state implementation plan development and transportation conformity in California on December 14, 2015. The EPA's approval of the EMFAC2014 emissions model for SIP and conformity purposes was effective on the date of publication of the notice in the **Federal Register**.

[356] 86 FR 67343, 67346.

[357] 2018 $PM_{2.5}$ Plan, App. D, D–122 to D–123.

[358] 40 CFR 93.109(f).

[359] 2018 $PM_{2.5}$ Plan, App. D, D–121 and D–122.

[360] Letter dated May 9, 2019, from Richard W. Corey, Executive Officer, CARB to Mike Stoker, Regional Administrator, EPA Region IX, 3.

day of NO_X are: 6.5:1 (*i.e.,* reducing 6.5 tons of NO_X is equivalent to reducing one ton of $PM_{2.5}$). The ratio is based on a sensitivity analysis based on a 30% reduction of NO_X or $PM_{2.5}$ emissions and the corresponding impact on design values at sites in Bakersfield and Fresno.

To ensure that the trading mechanism does not affect the ability of the SJV to meet the NO_X budget, the NO_X emission reductions available to supplement the $PM_{2.5}$ budget would only be those remaining after the NO_X budget has been met.[361] The Plan also provides that the SJV MPOs shall clearly document the calculations used in the trading, along with any additional reductions of NO_X and $PM_{2.5}$ emissions in the conformity analysis.

EPA Evaluation and Proposed Action

The EPA generally first conducts a preliminary review of budgets submitted with an attainment or maintenance plan for $PM_{2.5}$ for adequacy, prior to taking action on the plan itself, and did so with respect to the $PM_{2.5}$ budgets in the 2018 $PM_{2.5}$ Plan. On June 18, 2019, the EPA announced the availability of the 2018 $PM_{2.5}$ Plan with budgets and a 30-day public comment period. This announcement was posted on the EPA's Adequacy website at: *https://www.epa.gov/state-and-local-transportation/state-implementation-plans-sip-submissions-currently-under-epa.* The comment period for this notification ended on July 18, 2019. We did not receive any comments during this comment period.

Based on our proposal to approve the State's demonstration that emissions of ammonia, SO_2, and VOCs do not contribute significantly to $PM_{2.5}$ levels that exceed the 2012 annual $PM_{2.5}$ NAAQS in the SJV, as discussed in section IV.B of this preamble, and the information about ammonia, SO_2, and VOC emissions in the Plan, the EPA proposes to find that it is not necessary to establish motor vehicle emissions budgets for transportation-related emissions of ammonia, SO_2, and VOC to attain the 2012 annual $PM_{2.5}$ NAAQS in the SJV.[362] Based on the information about re-entrained road dust in the Plan and in accordance with 40 CFR 93.102(b)(3), the EPA proposes to find that it is not necessary to include re-entrained road dust emissions in the budgets for 2012 annual $PM_{2.5}$ NAAQS in the SJV.

For the reasons discussed in sections IV.G and IV.F of this proposed rule, the EPA is proposing to approve the RFP and attainment demonstrations, respectively, in the 2018 $PM_{2.5}$ Plan. The 2025 budgets for RFP and attainment, as shown in Table 9 of this proposed rule, are consistent with these demonstrations, are clearly identified and precisely quantified, and meet all other applicable statutory and regulatory requirements including the adequacy criteria in 40 CFR 93.118(e)(4) and (5). For these reasons, the EPA proposes to approve the 2025 budgets listed in Table 9. We provide a more detailed discussion in section VI of the EPA's 2012 Annual $PM_{2.5}$ TSD.

As discussed in section IV.I.2 of this proposed rule, we have already approved the 2022 RFP budgets for the SJV as part of our final rule on the State's Moderate area plan for the 2012 annual $PM_{2.5}$ NAAQS, as supplemented by the 2018 $PM_{2.5}$ Plan. The budgets that the EPA is proposing to approve relate to the 2012 annual $PM_{2.5}$ NAAQS only, and our proposed approval does not affect the status of the previously-approved budgets for the 1997 $PM_{2.5}$ NAAQS and related trading mechanism, which remain in effect for that $PM_{2.5}$ NAAQS, nor the 2006 24-hour $PM_{2.5}$ NAAQS and related trading mechanism, which remain in effect for that $PM_{2.5}$ NAAQS.[363]

As noted above, the State included a trading mechanism to be used in transportation conformity analyses that would be used in conjunction with the budgets in the 2018 $PM_{2.5}$ Plan, as allowed for under 40 CFR 93.124(b). This trading mechanism would allow future decreases in NO_X emissions from on-road mobile sources to offset any on-road increases in $PM_{2.5}$, using a 6.5:1 NO_X:$PM_{2.5}$ ratio. To ensure that the trading mechanism does not affect the ability to meet the NO_X budget, the Plan provides that the NO_X emission reductions available to supplement the $PM_{2.5}$ budget would only be those remaining after the NO_X budget has been met. The SJV MPOs will have to document clearly the calculations used in the trading when demonstrating conformity, along with any additional reductions of NO_X and $PM_{2.5}$ emissions in the conformity analysis. The trading calculations must be performed prior to the final rounding to demonstrate conformity with the budgets.

The EPA has reviewed the trading mechanism as described on pages D–125 through D–127 in Appendix D of the 2018 $PM_{2.5}$ Plan and concludes that it is appropriate for transportation conformity purposes in the SJV for the 2012 annual $PM_{2.5}$ NAAQS. The methodology for estimating the trading ratio for conformity purposes is essentially an update (based on newer modeling) of the approach that the EPA previously approved for the 2008 $PM_{2.5}$ Plan for the 1997 $PM_{2.5}$ NAAQS[364] and the 2012 $PM_{2.5}$ Plan for the 2006 24-hour $PM_{2.5}$ NAAQS.[365] The State's approach in the previous plans was to model the ambient $PM_{2.5}$ effect of areawide NO_X emissions reductions and of areawide direct $PM_{2.5}$ reductions, and to express the ratio of these modeled sensitivities as an inter-pollutant trading ratio.

In the updated analysis for the 2018 $PM_{2.5}$ Plan, the State completed separate sensitivity analyses for the annual and 24-hour standards and modeled only transportation-related sources in the nonattainment area. The ratio the State is proposing to use for transportation conformity purposes is derived from air quality modeling that evaluated the effect of reductions in transportation-related NO_X and $PM_{2.5}$ emissions in the SJV on ambient concentrations at the Bakersfield-California Avenue, Bakersfield-Planz, Fresno-Garland, and Fresno-Hamilton & Winery monitoring sites. The modeling that the State performed to evaluate the effectiveness of NO_X and $PM_{2.5}$ reductions on ambient annual concentrations showed NO_X:$PM_{2.5}$ ratios that range from a high of 7.1 at the Bakersfield-California Avenue monitor to a low of 6.0 at the two Fresno monitors.[366] We consider that the State's approach is a reasonable method to use to develop ratios for transportation conformity purposes. We therefore propose to approve the 6.5:1 NO_X for $PM_{2.5}$ trading mechanism as enforceable components of the transportation conformity program for the SJV for the 2012 annual $PM_{2.5}$ NAAQS.

Under the transportation conformity rule, once budgets are approved, they cannot be superseded by revised budgets submitted for the same CAA purpose and the same year(s) addressed by the previously approved SIP until the EPA approves the revised budgets as a SIP revision. As a general matter, such approved budgets cannot be superseded

[361] 2018 $PM_{2.5}$ Plan, App. D, D–126 and D–127.

[362] 40 CFR 93.102(b)(2)(v).

[363] 76 FR 69896, 69923–69924 (final rule approving direct $PM_{2.5}$ and NO_X budgets for 2012 and 2014 for the 1997 annual and 24-hour $PM_{2.5}$ NAAQS); and 85 FR 44192, 44204 (final rule approving direct $PM_{2.5}$ and NO_X budgets for 2020, 2023, and 2024 for the 2006 24-hour $PM_{2.5}$ NAAQS). The EPA has also proposed to approve budgets from the 2018 $PM_{2.5}$ Plan for direct $PM_{2.5}$ and NO_X for 2017 and 2020 for the 1997 24-hour $PM_{2.5}$ NAAQS. 86 FR 53150, 53176–53179.

[364] 80 FR 1816, 1841 (January 13, 2015) (noting the EPA's prior approval of motor vehicle emissions budgets for the 1997 annual and 24-hour $PM_{2.5}$ standards in the 2008 $PM_{2.5}$ Plan at 76 FR 69896).

[365] 81 FR 59876 (August 31, 2016).

[366] 2018 $PM_{2.5}$ Plan, App. D, D–126.

by revised budgets found adequate, but rather only through approval of the revised budgets, unless the EPA specifies otherwise in its approval of a SIP by limiting the duration of the approval to last only until subsequently submitted budgets are found adequate.[367]

In the submittal letter for the 2018 $PM_{2.5}$ Plan, CARB requested that we limit the duration of our approval of the budgets to the period before the effective date of the EPA's adequacy finding for any subsequently submitted budgets.[368] However, CARB recently clarified that since they have submitted EMFAC2021 for EPA review, they no longer request that we limit the duration of our approval.[369]

Lastly, in section IV.H of this proposed rule, the EPA is proposing to disapprove the contingency measure element of the 2018 $PM_{2.5}$ Plan with respect to the Serious area requirements for the 2012 annual $PM_{2.5}$ NAAQS. If the EPA were to finalize the proposed disapproval of the 2012 annual $PM_{2.5}$ NAAQS Serious area contingency measure element, the area would be eligible for a protective finding under the transportation conformity rule because the 2018 $PM_{2.5}$ Plan reflects adopted control measures that fully satisfy the emissions reductions requirements for the RFP and attainment year of 2025.[370]

Summary of Proposed Actions and Request for Public Comment

For the reasons discussed in this proposed rule, under CAA section 110(k)(3), the EPA proposes to approve, as a revision to the California SIP, the following portions of the SJV $PM_{2.5}$ Plan for the 2012 annual $PM_{2.5}$ NAAQS to address the CAA's Serious area planning requirements in the SJV nonattainment area:

1. The 2013 base year emission inventories (CAA section 172(c)(3) and 40 CFR 51.1008(b));

2. the demonstration that BACM, including BACT, for the control of direct $PM_{2.5}$ and $PM_{2.5}$ plan precursors will be implemented no later than 4 years after the area was reclassified (CAA section 189(b)(1)(B) and 40 CFR 51.1010(a));

3. the demonstration (including air quality modeling) that the Plan provides for attainment as expeditiously as practicable but no later than December 31, 2025 (CAA sections 189(b)(1)(A) and 40 CFR 51.1011(b));

4. plan provisions that require RFP toward attainment by the applicable date (CAA section 172(c)(2) and 40 CFR 51.1012(a));

5. quantitative milestones that are to be achieved every three years until the area is redesignated attainment and that demonstrate RFP toward attainment by the applicable attainment date (CAA section 189(c) and 40 CFR 51.1013(a)(2)(i));

6. motor vehicle emissions budgets for 2025 as shown in Table 9 of this proposed rule (CAA section 176(c) and 40 CFR part 93, subpart A); and

7. the inter-pollutant trading mechanism provided for use in transportation conformity analyses for the 2012 annual $PM_{2.5}$ NAAQS, in accordance with 40 CFR 93.124(b).

We may, however, reconsider this proposal if, based on new information or public comments, we find that the State has not satisfied the statutory criteria for Serious area $PM_{2.5}$ plans.

Pursuant to CAA section 110(k)(3), the EPA proposes to disapprove the contingency measure element of the 2018 $PM_{2.5}$ Plan for the 2012 annual $PM_{2.5}$ NAAQS, as implemented by section 5.7.3 of District Rule 4901, under CAA section 179(c)(9) and 40 CFR 51.1014. Among other reasons, the element includes no specific measures to be undertaken if the state fails to submit a quantitative milestone report for the area, or if the area fails to meet RFP or a quantitative milestone. In addition, the element includes a specific measure (section 5.7.3 of District Rule 4901) that may not result in any emissions reductions following a failure to attain the 2012 annual $PM_{2.5}$ NAAQS by the applicable attainment date under certain circumstances.

If we finalize the disapproval of the contingency measure element as proposed, the offset sanction in CAA section 179(b)(2) would apply in the SJV 18 months after the effective date of a final disapproval, and the highway funding sanctions in CAA section 179(b)(1) would apply in the area six months after the offset sanction is imposed.[371] Neither sanction will be imposed under the CAA if the State submits and we approve, prior to the implementation of the sanctions, a SIP revision that corrects the deficiencies that we identify in our final action. The EPA intends to work with CARB and the SJVUAPCD to correct the deficiencies in a timely manner.

In addition to the sanctions, CAA section 110(c)(1) provides that the EPA must promulgate a federal implementation plan (FIP) addressing any disapproved elements of an attainment plan two years after the effective date of disapproval unless the State submits, and the EPA approves, a SIP submission that cures the disapproved elements.

Also, we previously approved the Serious area plan RFP and attainment demonstrations and the motor vehicle emissions budgets for the 2006 24-hour $PM_{2.5}$ NAAQS[372] and the Moderate area plan RACM, additional reasonable measures, and RFP demonstrations.[373] In this proposed rule, we are proposing to approve the Serious area plan BACM/BACT, RFP, and attainment demonstrations, and motor vehicle emission budgets for the 2012 annual $PM_{2.5}$ NAAQS. Because of those actions, we are proposing to issue a protective finding under 40 CFR 93.120(a)(3) to the disapproval of the contingency measure element.

Without a protective finding, the final disapprovals would result in a conformity freeze, under which only projects in the first four years of the most recent conforming Regional Transportation Plans (RTPs) and Transportation Improvement Programs (TIPs) can proceed. Generally, during a freeze, no new RTPs, TIPs, or RTP/TIP amendments can be found to conform until another control strategy implementation plan revision fulfilling the same CAA requirements is submitted, the EPA finds its motor vehicle emissions budget(s) adequate pursuant to § 93.118 or approves the submission, and conformity to the implementation plan revision is determined.[374] Under a protective finding, the final disapproval of the contingency measures elements would not result in a transportation conformity freeze in the SJV $PM_{2.5}$ nonattainment area and the MPOs may continue to make transportation conformity determinations.

We will accept comments from the public on these proposals for the next 30 days. The deadline and instructions for submission of comments are provided in the **DATES** and **ADDRESSES** sections at the beginning of this proposed rule.

[367] 40 CFR 93.118(e)(1).

[368] Letter dated May 9, 2019, from Richard W. Corey, Executive Officer, CARB, to Mike Stoker, Regional Administrator, EPA Region IX, 3.

[369] Email dated November 30, 2021, from Nesamani Kalandiyur, Manager, Transportation Analysis Section, Sustainable Transportation and Communities Division, CARB, to Karina O'Connor, Air Planning Office, EPA Region IX.

[370] 40 CFR 93.120(a)(3).

[371] 40 CFR 52.31.

[372] 85 FR 44192.

[373] 86 FR 67343, 67346.

[374] 40 CFR 93.120(a)(2).

VI. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *https://www.epa.gov/laws-regulations/laws-and-executive-orders.*

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

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA because this action does not impose additional requirements beyond those imposed by state law.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities beyond those imposed by state law.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action does not impose additional requirements beyond those imposed by state law. Accordingly, no additional costs to state, local, or tribal governments, or to the private sector, will result from this action.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175, because the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction, and will not impose substantial direct costs on tribal governments or preempt tribal law. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not impose additional requirements beyond those imposed by state law.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

Section 12(d) of the NTTAA directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. The EPA believes that this action is not subject to the requirements of section 12(d) of the NTTAA because application of those requirements would be inconsistent with the CAA.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Population

The EPA lacks the discretionary authority to address environmental justice in this rulemaking.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Ammonia, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Sulfur dioxide, Volatile organic compounds.

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

Dated: December 16, 2021.

Deborah Jordan,

Acting Regional Administrator, Region IX.

[FR Doc. 2021–27796 Filed 12–28–21; 8:45 am]

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